SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 859.

THE INTERSTATE COMMERCE COMMISSION, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

In the Court of Appeals of the District of Columbia.

No. 2276.

THE UNITED STATES OF AMERICA ex Rel. HUMBOLDT STEAMSHIP CO., &c., Appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION.

a Supreme Court of the District of Columbia.

No. 52792. At Law.

THE UNITED STATES OF AMERICA ex Rel. HUMBOLDT STEAMSHIP COMPANY, a Corporation, Petitioner,
vs.
THE INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 Filed July 21, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52792.

THE UNITED STATES OF AMERICA ex Rel. HUMBOLDT STEAMSHIP COMPANY, a Corporation, Petitioner,
vs.
THE INTERSTATE COMMERCE COMMISSION, Respondent.

To the Honorable Justice of the Supreme Court of the District of Columbia, holding a Circuit Court:

The petition of the Humboldt Steamship Company, a corporation, respectfully represents unto your honor:

I. That it is advised that this Honorable Court has original juris-

diction in mandamus for and in respect to the matters and things in this petition hereinafter set forth.

II. Petitioner states that it is a corporation duly organized under the laws of the State of California, and is a common carrier and engaged as such in the transportation of passengers and property by steamship between Seattle in the State of Washington, and Skagway, Alaska, and between other places; and receives at Seattle, Skagway and said other points for transportation to and from said
2 points to various destinations many different articles and commodities.

III. (*a*) That the respondent, The Interstate Commerce Commission, is a body organized under and by virtue of an act entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 Stat. L., 379); and acts amendatory thereof and supplementary thereto (25 Stat. L., 855; 26 Stat. L., 743; 28 Stat. L., 643; 34 Stat. L., 584; 34 Stat. L., 838). That said respondent is an administrative, quasi-judicial tribunal which by said acts has heretofore been invested with certain powers, duties and authority in respect to the transportation of passengers and property, and in respect to certain carriers engaged in said transportation in the particular manner provided in Section one of said Act of February 4, 1887, as amended.

(*b*) That among other duties imposed upon the respondent herein, as provided in Section twelve of said Act, is that "The Commission is hereby authorized and required to execute and enforce the provisions of this Act."

That among other provisions of said Act is one providing in Section six thereof as follows:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

Said Commission is also invested with power and authority upon complaint by certain designated classes of parties to determine
3 reasonable rates, regulations and practices; to establish through routes and joint rates; to take appropriate proceedings to prohibit carriers subject to said Act from violating any of the provisions thereof, and to compel said carriers to comply with all the provisions of said Act, and particularly to compel said carriers to cease and desist from carrying into force and effect, any contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from a place of origin to a place of destination.

(*c*) That not every carrier engaged in the transportation of passengers and property is subject to the said Act to regulate commerce but only such carriers as are by Section one of said Act made subject thereto.

IV. (*a*) That heretofore, to wit, on May 26, 1909, the petitioner,

being one of the parties entitled so to do pursuant to Section fifteen of the Act to regulate commerce, filed a petition in the office of the respondent against The White Pass and Yukon Route, consisting of The Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, Ltd., as defendants.

That petitioner was then advised and is now advised that each of said defendants are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment wholly by railroad, or partly by railroad and partly by water between points in Alaska, and between points in Alaska and points in the Dominion of Canada, and as such common carrier each was and is subject to the provisions of the said Act to regulate commerce.

That said proceeding is No. 2518 on the docket of the respondent.

4 (*b*) That the defendants thereafter in accordance with the said Act to regulate commerce and pursuant to the rules of practice adopted and promulgated by the respondent filed answers to said petition, said answers and said petition forming certain issues.

(*c*) That thereafter in said proceeding there was an intervention as party defendant by The Copper River and Northwestern Railway Company; and as plaintiffs Miller-Reed-Pease Company; A. D. Blowers and Company, Inc.; H. S. Emerson Company; and Sunde and Erland Company—all of Seattle in the State of Washington.

(*d*) That thereafter, to wit, on October 7, 1909, in accordance with said Act to regulate commerce, a full and complete hearing upon the issues made was had at Seattle in the State of Washington; and on the same date and at the same place oral argument was had.

(*e*) That thereafter, permission for the purpose having been granted, briefs were filed on behalf of the petitioner and on behalf of the defendants and intervenors.

(*f*) That thereafter, to wit, on July 6, 1910, respondent in accordance with the Act to regulate commerce made, entered and filed a report and order in said proceeding, by which order it was decreed that the complaint of the petitioner heretofore referred to, "be, and it is hereby, dismissed"; that said report of the Commission is to be found in Volume XIX of the reports of the Interstate Commerce Commission at page 105; that copy of said report and opinion is attached hereto as Exhibit A, and it is prayed that the same be taken and read as a part hereof; that the conclusion of respondent in said proceeding, as announced in said report, is based upon an original inquiry and investigation, by the said Commission, entitled, "In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska," which said report and opinion is to be found in Vol-

5 ume XIX Interstate Commerce Commission Reports at page 81. A copy of said last mentioned report is attached hereto as Exhibit B and it is prayed may be taken and read as a part hereof

That said report "In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska" is in two parts being a majority report written by Commissioner Harlan of the respondent, and a dissenting opinion by Commissioner Clements of the respondent, in

which dissent Commissioners Cockrell and Lane of the respondent concurred. That said majority report held in substance that Alaska is not a Territory of the United States in the sense in which that phrase is used in said Act to regulate commerce, as amended, and that therefore respondent has no authority or jurisdiction over carriers engaged in the transportation of passengers or property within Alaska.

(*g*) That petitioner being advised that the said report and order in Humboldt Steamship Company vs. White Pass and Yukon Route, et al., and the decision "In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska" were erroneous as matters of law, petitioner thereafter, to wit, on the 16th day of July, 1910, filed with said respondent, in accordance with section 16*a* of the said Act to regulate commerce, a petition for a rehearing in the nature of a reargument, alleging as ground for such application that the Commission erred as matter of law in holding that it is without jurisdiction over carriers operating in Alaska, and that petitioner suffers great damage by reason of said holding; that said petition for rehearing was denied by respondent on July 19, 1910.

V. Petitioner states that the relief sought by its petition to The Interstate Commerce Commission in case No. 2518, filed May
6 26, 1910, was that, inasmuch as the defendants had failed to file with the respondent and print and keep open to public inspection, as required by law, schedules in the form prescribed by the said Act to regulate commerce between points in Alaska and points in the Dominion of Canada, and other places, the said respondent should direct the said defendant to print, file and publish and keep open to inspection said rates, fares and charges; that the said defendants thereto should establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the State of Washington; that the defendants therein should afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines; that said defendants should cease and desist from preventing by sundry devices the carriage of freights from being, and being treated as one continuous carriage from place of shipment to place of destination when such freights are originated or in any wise handled by the Humboldt Steamship Company; and for such other and further relief as the respondent might deem necessary in the premises.

VI. Petitioner is advised that the defendants to the proceeding above mentioned (Humboldt Steamship Company vs. The White Pass and Yukon Route, et al., No. 2518, on the docket of the repondent) are each carriers subject to the said Act to regulate commerce, and being so subject are required to print, file and keep open to public inspection their rates, fares and charges between the points aforesaid; and also subject to all of the provisions of the said Act to regulate commerce and to the authority of the respondent given by said Act.

Petitioner is also advised that the said respondent has exclusive jurisdiction in respect to numerous provisions of the said Act
7 to regulate commerce, and particularly with respect to the matters and things stated in petitioner's complaint in said pro-

ceeding before the respondent; and that said respondent in charged with the duty of executing and enforcing each and every of the provisions of said Act; that when specifically charged with such duty said respondent can exercise no discretion in respect thereto.

VII. That petitioner has no appeal or review by way of appeal or otherwise from the decision of the respondent in case No. 2518; that said Act to regulate commerce provides no remedy by which an order dismissing a complaint or petition before the Commission can be reviewed or reconsidered otherwise than by rehearing. And petitioner having applied for a rehearing and said rehearing having been denied the petitioner is without remedy to proceed in respect to the matters and things alleged in said original petition save only and excepting by application to this Honorable Court for a writ of mandamus to compel said Interstate Commerce Commission to comply with the duties and obligations imposed upon it by the said Act to regulate commerce.

Wherefore, the premises considered, petitioner prays that your Honor grant a rule directed to the respondent to show cause by a time limited in said rule why the said respondent should not take jurisdiction of the matters and things alleged in the complaint of the petitioner, being No. 2518 on the docket of said respondent, and why it should not require the defendants in said proceeding to print, file and keep open to public inspection their and each of their rates, fares, charges and schedules, as required by the Act to regulate commerce.

2. That this Honorable Court direct the respondent to certify to this Honorable Court the records and proceedings in said pro-
8 ceeding, that this Court may hear and determine whether or not said respondent has jurisdiction of the matters and things in said petition set forth;

3. That this Court issue to respondent the peremptory writ of mandamus requiring and commanding the said respondent to take jurisdiction of the matters and things set forth in said petition;

4. That this Court issue the peremptory writ of mandamus directed to the respondent commanding and directing it to execute and enforce the said act, and particularly in respect to requiring the defendants in case No. 2518 to print, file, publish and keep open to public inspection their and each of their rates, fares and schedules as required by said Act;

5. And for such other and further relief as the petitioner may be entitled to in the premises.

HUMBOLDT STEAMSHIP COMPANY,
By CHARLES D. DRAYTON, *Attorney.*

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me John R. Young, Clerk in and for the District aforesaid, Charles D. Drayton, and made oath in due form of law that he is the attorney and agent of the petitioner, is acquainted with the facts alleged in the foregoing petition by him sub-

scribed, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

CHARLES D. DRAYTON.

Subscribed and sworn to before me, this 21st day of July, A. D. 1910.

[SEAL.] JOHN R. YOUNG, *Clerk.*

JOHN B. DAISH,
Of Counsel for Petitioner.

9 EXHIBIT "A."

Opinion No. 1347.

Before the Interstate Commerce Commission.

No. 2518.

HUMBOLDT STEAMSHIP COMPANY
v.
WHITE PASS & YUKON ROUTE et al.

Decided June 6, 1910.

Report and Order of the Commission.

10 No. 2518.

HUMBOLDT STEAMSHIP COMPANY
v.
WHITE PASS & YUKON ROUTE et al.

Submitted January 14, 1910; Decided June 6, 1910.

Following the decision In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska, 19 I. C. C. Rep., 81, complaint asking for establishment of through routes and joint rates from Seattle, Wash., to points in Alaska dismissed because the Commission is without jurisdiction over carriers operating in Alaska.

Charles D. Drayton and Charles F. Munday for complainant.

Burdett, Thompson & Law for Columbia River & Northern Railway Company, intervener.

F. C. Elliott for defendants.

Report of the Commission.

KNAPP, *Chairman:*

This proceeding was brought to secure an order requiring defendants to join with complainant in establishing through routes and

joint rates from Seattle, Wash., to points reached by defendants' lines, and to cease and desist from alleged unlawful discrimination in the charges assessed for wharf or dock facilities at Skagway, Alaska.

The Humboldt Steamship Company is a corporation organized in 1895 under the laws of California with a capital stock of $200,000. It operates one steamship, the Humboldt, between Seattle and Skagway. The tonnage capacity of this steamer is about 1,075 tons gross, 689 tons net, and she can accommodate 290 passengers, 130 first class and 160 steerage. During the open season the Humboldt leaves Seattle for Skagway once in ten days.

The White Pass & Yukon Route is the trade name applied to the route composed of the Pacific & Arctic Railway & Navigation Company, British Columbia Yukon Railway Company, British Yukon Railway Company, and the British Yukon Navigation Company, Limited, which appear to be operated under a common control or arrangement for through carriage. The White Pass & Yukon
11 Route extends 20.2 miles through American territory, from Skagway to the international boundary line; the remainder of the rail line is in Canadian territory. Traffic moves by rail from Skagway to White Horse, a distance of 112 miles; thence down the Yukon River to Dawson and other points in Canada and Alaska on steamers operated in connection with the White Pass & Yukon Route. Through rates are in effect between Skagway and Dawson and intermediate points. Very little traffic moves to points on the railroad between Skagway and the international boundary line; the bulk of the through traffic is destined to Dawson and other points in Canada and to Fairbanks and other points in Alaska reached by steamers.

Through routes and joint rates were established between the Humboldt Company and the White Pass & Yukon Route upon the opening of the railroad for traffic in 1899. The Pacific Coast Steamship Company operates two and the Alaska Steamship Company operates three regular steamers between Seattle and Skagway, and under their sailing schedule a boat leaves Seattle about every third day. The defendants join with the companies just named in through routes and joint rates. During 1902 and 1903 the Humboldt was operated in conjunction with the Alaska Steamship Company, and from 1903 to 1908 in conjunction with the Pacific Coast Steamship Company. Under this arrangement the Alaska and Pacific companies collected freight money and sold tickets for the Humboldt Company upon a commission basis. Upon the termination of this arrangement, early in 1909, the defendants canceled their through routes and joint rates with the Humboldt Company.

At present freight shipped on the Humboldt is billed locally to Skagway. There the defendants rebill the freight to destination and pay the Humboldt Company the difference between the through rate from Seattle and defendants' rate from Skagway to destination. Out of its share the Humboldt is obliged to pay $2 per ton wharfage at Skagway. For example, on Class A goods, which includes general merchandise, the through rate from Seattle to Dawson is $60 per ton.

Defendants' rate from Skagway to Dawson is $53 per ton, leaving $7 per ton as the Humboldt's proportion, out of which it must pay $2 wharfage, resulting in net compensation of $5 per ton. The Alaska and Pacific companies receive $9 per ton net out of the through rate for the transportation from Seattle to Skagway. On certain commodities the rate from Skagway to Dawson is higher than the through rate from Seattle to Dawson, and the Humboldt can engage in the carriage of such traffic only at a loss of the difference between through and local rates.

Freight is transferred at Skagway from steamers to railroad over a dock which belongs to the North Pacific Wharves & Trading
12 Company, a corporation organized under the laws of Washington. This dock is operated by defendants as a terminal facility. Prior to their cancellation of through-routing arrangements, defendants absorbed the wharfage charges on through traffic carried by the Humboldt, and at present they absorb the wharfage charges which accrue on such through traffic brought to Skagway by the Pacific and Alaska companies. On local traffic to Skagway handled by the Pacific and Alaska companies, the wharfage charge is $1 per ton, but upon all traffic handled by the Humboldt Company the wharfage charge is $2 per ton.

Beyond the foregoing outline of the situation presented in this case, we deem it unnecessary to state the facts in greater detail, and expressly refrain from passing judgment upon the merits of the controversy, because we are constrained to hold, upon authority of the decision recently announced In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska, 19 I. C. C. Rep., 81, that the Commission is without jurisdiction to make the order sought by complainant.

13 *Order.*

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 6th Day of June, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 2518.

HUMBOLDT STEAMSHIP COMPANY
v.
WHITE PASS & YUKON ROUTE et al.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

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EXHIBIT "B."

Opinion No. 1345.

Before the Interstate Commerce Commission.

No. 2088.

In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska.

Decided June 6, 1910.

Report of the Commission.

15

No. 2088.

In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska.

Decided June 6, 1910.

1. The district of Alaska is not a territory of the United States in the sense in which that phrase is used in the act to regulate commerce as amended, and the Commission has therefore no authority or jurisdiction over carriers engaged in transportation of passengers or property within the district of Alaska.
2. The general rule that a special tribunal ought not to enlarge its jurisdiction by intendment but ought to exercise only the powers clearly conferred by statute applies with special if not controlling force to the exercise by the Commission of jurisdiction in Alaska in view of the fact that under the act of May 14, 1898, power to regulate the rates of railroads in Alaska was conferred upon another branch of the government.

Report of the Commission.

HARLAN, Commissioner:

Omitting such parts as are not pertinent to this inquiry, the language of section 1 of the act to regulate commerce, as amended, is as follows:

That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from one place in a territory to another place in the same territory.

The question that now arises is whether the Congress, in thus expressly defining and limiting the application of the act, intended to bring within its provisions the transportation of passengers or property between points within that part of the United States commonly referred to as Alaska. Has the Commission the same jurisdiction over rail and water lines there engaged in such transportation as it has over rail and water lines engaged in similar transportation within New Mexico and Arizona, the only remaining organized territories, as that phrase is commonly understood, within what may be referred to in general terms as the geographical limits of the United States? In other words, conceding that Alaska is territory of the United States within the meaning of Article IV, section 3, of the Constitution, is it a territory in the sense in which that expression is commonly used in federal legislation?

16 Such an inquiry, were the time available, might well justify an investigation of the conditions under which the United States successively acquired title over Louisiana, Florida, Texas, the Mexican cession, the Gadsden tract, and is now exercising the rights of sovereignty in the Philippines, Porto Rico, and other islands lately acquired from the Spanish Crown; it would also be not wholly without interest to make an examination of the federal legislation under which some of those territories have been held and governed until finally separated into organized territorial governments and later admitted into the Union as states. It will perhaps suffice, however, for our present purpose, to say that under the authority of the so-called insular cases, as well as under previous announcements by the Supreme Court of the United States, it may now be taken as settled judicial doctrine in this country (*a*) that the United States, like any other nation, may, as an incident to sovereignty, acquire territory by purchase or as the result of war; (*b*) that the territory so acquired may be incorporated into the United States and at once become subject to all the provisions of the Constitution; or (*c*) that such territory may not be incorporated into the United States, but may be held and governed by the Congress, free from some, at least, of the constitutional restraints and restrictions that control in territory that has been distinctly incorporated into the United States. This seems to be the clear inference to be drawn from those cases. And so the insular cases hold in general terms that the Philippines, Porto Rico, and other islands, acquired under the treaty of peace with the Kingdom of Spain, have not been incorporated into the United States, and are not, in a constitutional sense, a part of the United States and subject to all the provisions of the constitution. On the other hand, New Mexico and Arizona, being part of the original territory acquired from Mexico under the treaty of 1848, have been incorporated into the United States and are now organized territories; and their citizens are entitled to all the benefits and are subject to all the restraints of the constitution.

But whether incorporated into the United States or not, all the territory over which the United States is sovereign, and which has not been erected into states, is governed by the Congress under the au-

thority of section 3 of Article IV of the Constitution, which provides as follows:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Speaking of this clause, it is said in De Lima v. Bidwell, 182 U. S., 1, at page 197, that:

Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states, etc. In short, when once acquired by treaty it belongs to the United States and is subject to the disposition of Congress.

17 It follows therefore that Alaska may be territory of the United States in a purely geographical sense without being a territory in a political sense, or, as above stated by the court, without being a territory with "a local territorial government." To put it in another way, territory of the United States may remain unorganized and be governed directly by the Congress under its power to make "all needful rules and regulations respecting the territory," or it may be set off from the territory of the United States by definite boundaries and organized with a local territorial government having a legislature of its own. When this is done such part of the territory of the United States as lies within the prescribed boundaries becomes a territory of the United States. Having been erected into a local territorial government in that manner, it becomes an organized territory. Assuming therefore that the phrase "a territory of the United States," as used in section 1 of the act, can only refer to the organized territories, it may be well to examine the federal legislation in order to ascertain whether Alaska is to be assigned to that category in connection with the work of this Commission. There are many statutes that relate specially to Alaska; and there are other general enactments relating both to organized and unorganized territories that throw some light upon the question. Reference will first be made to the special legislation.

Alaska was ceded to the United States by treaty with His Majesty, the Emperor of all the Russias, proclaimed in this country on June 20, 1867. In that convention the geographical limits of Alaska are defined. By the act of July 27, 1868 (Rev. Stat., second edition, sec. 1954-1976), provisions were made relating to the "unorganized territory of Alaska." It is there described as "territory ceded to the United States by the Emperor of Russia." It is also referred to as "Alaska Territory;" but it was not given a legislature or otherwise organized into "a local territorial government." Since that date Alaska, having no legislature of its own, has been the subject of much legislation by the Congress. Under the act of May 17, 1884 (Rev. Stat., 1 Sup., chap. 53, p. 430), by which the first civil government was established for Alaska, it was provided that the ceded territory "shall constitute a civil and judicial district;" and that the temporary seat of government of said district should be at Sitka. The laws of Oregon were extended over the "district of Alaska," and

became its organic law. It is to be noted that in section 14 of that enactment reference is also made to the statutes of the United States, hereinafter again referred to, relating to the "unorganized Territory of Alaska."

After gold was discovered in Alaska in 1897 a number of bills were introduced in Congress for the purpose of providing the
18 district of Alaska with the form of government prescribed for the territories of the United States, but none of them was enacted into law. By the act of June 4, 1897, provision was made for the appointment of commissioners of deeds and a marshal for the "district of Alaska." By the act of July 24, 1897, a surveyor-general for the "district of Alaska" was authorized. In the act of June 6, 1900 (31 Stat. L., 321), making further provision for a civil government for Alaska, it is again provided that the territory so ceded to the United States shall constitute a "civil and judicial district," with a "temporary seat of government of said district" at Juneau. Full provisions are made in that act for the appointment of a governor, and he is vested with power to "perform generally in and over said district such acts as pertain to the office of governor of a territory so far as the same may be made or become applicable thereto." The powers of Alaskan officials are thus amplified by direct comparison with the powers of like officials of a real territory. And throughout the act Alaska is referred to as the district of Alaska. It will also be observed that the government so provided has no legislature, Congress retaining full powers of legislation and other control as fully as in the District of Columbia.

Rudimentary as the so-called government is, the act by which the government was created in precise terms designates that portion of the territory of the United States as the district of Alaska. And that is now its official title and designation. In the enactment of May 7, 1906 (34 Stat. L., pt. 1, 169), providing a delegate to the House of Representatives, Alaska, is referred to in the title as the territory of Alaska, and also in the body of the act. Elsewhere in the act the citizens of Alaska are referred to as "the people of the territory of Alaska." But apparently the word "territory" is there used in a loose or descriptive sense, for in the same paragraph, where reference is made to the political status of the delegate, it is required that he shall be "an inhabitant and qualified voter of the district of Alaska." As a political division it is also referred to in the act as the district of Alaska.

Even so recently as the general appropriations act of 1907 (34 Stat. L., 963) Congress, under the general title "Government in the Territories" makes an appropriation for the "district of Alaska" for the current fiscal year, although under the same head appropriations are also made for the "territory of Arizona," the "territory of New Mexico," and the "territory of Hawaii." In the general appropriation act of 1908 it is referred to as a district. (35 Stat. L., 212.) The act of January 27, 1905 (33 Stat. L., p. 616), providing for the construction and maintenance of roads, schools, and an insane asylum in the district of Alaska, requires all moneys collected from

liquor and trade licenses outside "of the incorporated towns
19 in the district of Alaska," to be deposited in the Treasury of the United States for those purposes. In the amendment to hat act of March 3, 1905 (33 Stat. L., p. 1262), Alaska is again poken of as the district of Alaska. This is also true of an act of the ame date (33 Stat. L., p. 1265), prescribing the duties of "the sec- retary of the district of Alaska."

The first and second sections of chapter 1 of title 1 of the act of March 3, 1899 (30 Stat. L., p. 1253), "to define and punish crimes n the district of Alaska and to provide a code of criminal procedure or said district," are as follows:

SEC. 1. That the district of Alaska consists of that portion of the erritory of the United States ceded by Russia by the treaty of March hirtieth, eighteen hundred and sixty-seven.

SEC. 2. That the crimes and offenses defined in this act, committed ithin the District of Alaska, shall be punished as herein provided.

This rather extensive code, so far as a cursory examination of it as disclosed, contains the words "state" and "territory" only when distinctly refers, as in section 9, chapter 3, title 2, to the states nd organized territories of the United States. When Alaska itself referred to it is designated as the district of Alaska.

The civil code of Alaska is contained in the act of June 6, 1900 (31 tat. L., 321), heretofore referred to, in which it is provided, in sec- on 1, that the territory ceded to the United States by Russia, and nown as Alaska, shall constitute a civil and judicial district.

The general statutes relating to territories are to be found in title 3 of the Revised Statutes under the designation of "The Territories." his title is divided into three chapters. Chapter 1, entitled "Pro- sions common to all the territories," provides an executive, legisla- ve, and judicial branch for each organized territory and defines the ope of their several authorities; the governor and the judges of the preme court, together with the secretary and marshal of the terri- ry, being appointed by the President, and the legislature being ected by the people. There are further provisions limiting the laries of officers and forbidding the granting of special privi- ges and private charters, etc., all of which, except where otherwise ecifically provided by the Congress, are of controlling force in the ganized territories, but not in the district of Alaska. Chapter 2, titled "Provisions concerning particular organized territories," fines the geographical boundary lines of the several territories of e United States as they were severally organized. The respective tions describing the geographical limits of the several territories ntain provisions as follows: "That part of the territory of the ited States bounded as follows, etc., is erected into a temporary vernment by the name of the Territory of New Mexico," or "is created into a temporary government by the name of the Territory of Utah," or "is organized into a temporary govern- ment by the name of the Territory of Washington," etc. apter 3 contains "Provisions relating to the unorganized territory Alaska." This chapter embodies the provisions of the act of July 1868, heretofore referred to, and some subsequent legislation

prior to the act of May 17, 1884, which created the "district of Alaska." As indicating the extent of its unorganized condition at that time it will be observed that it is provided in chapter 3 (sec. 1957) that violations of the provisions of that chapter were to be prosecuted in the district courts of the United States in California or Oregon and in the district courts of what was then the Territory of Washington. Apparently courts were not provided in Alaska until it was made a district under the act of May 17, 1884. Alaska, in chapter 3, was thus officially classified by itself, and as something apart from the organized territories.

Alaska being a district and unorganized territory, has required special legislation by the Congress. It has not at any time been erected into an organized territory, although it is understood that one or more bills were lately pending in the Congress for that purpose. There has been no declaration by the Congress that it is an organized territory. The organized territories carved out of the territory of the United States have severally been declared to be territories and have been organized and empowered to carry on a local government. In nearly all such acts the word "territory" is used both in its geographical and in its political sense. The enabling act of New Mexico, for example, provides that "All that portion of the territory of the United States bounded as follows, etc., is erected into a temporary government by the name of the Territory of New Mexico." The word thus used in both senses will be found in the enabling acts of other territories. But no such language is to be found anywhere with respect to the district of Alaska. While it is frequently loosely referred to in the statutes as the territory of Alaska, it has never been "erected" into a territory or created or otherwise constituted a territory of the United States as have the organized territories. The act creating a civil government for it expressly and in precise terms designates it as the District of Alaska, and it is so designated in all other federal legislation where accuracy of expression is required.

In its enactments Congress has ordinarily maintained the distinction between the unorganized and the organized territories. When it has desired general legislation to extend to Alaska it is usual to find express provisions to that effect differentiating it from the organized territories. The first section of the bankruptcy act, for example, defines the word "state," as used in the subsequent provisions of the act, as follows: "States shall include the territories, the
21 Indian Territory, Alaska, and the District of Columbia."

On May 14, 1898, the homestead land laws of the United States, already in force in the territories, were extended to the "district of Alaska" (30 Stat. L., 409). As late as June 6, 1900 (31 Stat. L., 658), the coal-land laws were extended to the "district of Alaska." The act of May 30, 1908 (35 Stat. L., 554), relating to the interstate transportation of explosives, does not confine its operation to the states, territories, and the District of Columbia, but extends it to "any state, territory, or district of the United States," thus clearly indicating the understanding in the Congress that the District of Columbia is not the only district in the United States.

The status of Alaska has been considered by the courts in several cases. In Steamer Coquitlam v. United States, 163 U. S., 346, a proceeding in admiralty had been brought by the Government in the district court of Alaska for the forfeiture of the steamer for an alleged violation of law. A decree was entered for the Government and an appeal was prosecuted to the circuit court of appeals for the ninth district; and the question was certified to the Supreme Court whether that court had jurisdiction to entertain an appeal from a decree of the district court of Alaska. It was held that while it had no jurisdiction in virtue of its appellate jurisdiction over circuit and district courts mentioned in the act of March 3, 1891, it had jurisdiction in virtue of the general authority conferred by the fifteenth section of that act upon the circuit court of appeals to review the judgment of the supreme court of any territory assigned to such circuit by the Supreme Court of the United States. In its order of May 11, 1891, Alaska had been assigned to the ninth circuit. The court says, page 352:

Alaska is one of the territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that territory.

In Rasmussen v. U. S., 197 U. S., 516, the plaintiff in error had been indicted for keeping a disreputable house and was tried before a jury of six persons. The result was a verdict and judgment from which an appeal was taken to the Supreme Court of the United States on the constitutional objection that a jury of six persons was not competent to convict. The Attorney-General, in support of the judgment, made two points:

1. Alaska was not incorporated into the United States, and therefore the sixth amendment did not control Congress in legislating for Alaska.

2. That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the sixth amendment were not controlling on Congress when legislating for Alaska.

2 In discussing the first point, the court carefully reviews the so-called insular cases, and holds that Alaska has been incorporated into and is a part of the United States. The second point gave the court a direct opportunity to hold that Alaska was an organized territory. But when considering that question, instead of doing so it simply held that the Constitution does apply to Alaska, and therefore a trial and conviction upon a verdict by a jury of six was unlawful. Upon that ground the judgment was reversed and a new trial ordered.

There were two concurring opinions. The one by Mr. Justice Brown is of interest in this connection, because he states (p. 535):

Hitherto we have been content to divide our territories into the organized and unorganized; but now we are asked to introduce a new classification of "incorporated" territories without attempting to define what shall be deemed an incorporation.

Again, at page 532, he says:

If the act of May 17, 1884, providing a civil government for Alaska (23 Stat. L., 24), be regarded as organizing a territory there, it would follow that such territory at once fell within Revised Statutes, section 1891, and the Constitution was extended to it without further action. The first article declares that Alaska "shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." Had the opinion treated the territory as organized under this act, I should not have dissented from this view, since section 1891 would have applied to it.

It is evident therefore that Mr. Justice Brown understood the decision of the court to hold that Alaska had been incorporated into the United States, but that it was not an organized territory. And a reading of the opinion seems fully to justify that view. Under section 1891, to which Mr. Justice Brown refers, it is provided that "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized as elsewhere within the United States." Had the court been of the opinion that Alaska was an organized territory, an announcement to that effect would have disposed of the question raised on the argument by the Attorney-General without other discussion than a reference to that section of the Revised Statutes.

The distinction between an organized and an unorganized territory is one that has been commonly understood in the public mind. The special point separating the one from the other is the existence or non-existence of a local legislature. If it has a legislature, it is then a local territorial government and is to be classified with the organized territories. If it has no legislature, it is simply a part of the unorganized territory of the United States with the Congress as its legislature and guardian. It is not in such case a local territorial government. As indicating this general popular understand-
23 ing of the matter it is not without interest to observe that in the Century Dictionary a territory is defined as follows (vol. 8, p. 6248):

In the United States, an organized division of the country not admitted to the complete rights of statehood. Its government is conducted by a governor, judges, and other officers appointed from Washington, aided by a territorial legislature. * * * There are now (1898) three organized territories, New Mexico, Arizona, and Oklahoma, and there are also two unorganized territories, the Indian Territory and Alaska.

In Webster's Dictionary the definition is given in this language:

In the United States, a portion of the country not included within the limits of any state, and not yet admitted into the Union as a state, but organized with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States.

This view has found very clear expression in one or two adjudicated cases. In Ex parte Morgan, 20 Fed. Rep., 305, the word "territory" as used in the laws of the United States has been judicially defined as follows:

A territory, under the Constitution and laws of the United States, is an inchoate state, a portion of the country not included within the limits of any state, and not yet admitted into the Union as a state, but organized under the laws of Congress, with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States.

In In re Lane, 135 U. S., 443, the defendant had been indicted and convicted for rape under a federal statute providing that any person committing that offense "in the District of Columbia or other places, except the territories, over which the United States has exclusive jurisdiction, shall be guilty of a felony." The offense was committed in Oklahoma, then a part of what was known as "Indian Territory." The defendant contended that Indian Territory was a territory within the exception of the statute above mentioned, and that his conviction under that statute was therefore erroneous, because the statute did not apply in the territories. The Supreme Court, in disposing of the contention, uses language that seems to control our disposition of this question:

But we think the words "except the territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States.

They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower House of that body, except what are called Delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called organic acts, passed by Congress, conferring such powers on them. It is this class of governments, long known by the name of territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.

Oklahoma was not of this class of territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits, as the territories of the United States have and always have had. We are therefore of the opinion that the objection taken on this point by the counsel for prisoner is unsound.

That case judicially determines that a law passed by the Congress of the United States, which excludes all territories of the United States from its operation, did not exclude the so-called Indian Territory, which at that time had no organized form of territorial government embracing a legislative assembly. It was not therefore a territory of the United States. When subsequently organized into a territory under the act of May 2, 1890 (26 Stat. L., 81), the language used was "That all that part of the United States, etc., is hereby

erected into a temporary government by the name of Territory of Oklahoma." It was then given a local legislature and became an organized territory—a territory of the United States. Had such a declaration by the Congress been made prior to the defendant's indictment and conviction, his claim of the benefit of the exception of the statute would undoubtedly have been successful.

Under our system there are three traditional stages of government for the territory of the United States: First, where there is no local legislature or other local authority except a governor and other officials appointed by the President and confirmed by the Senate. In such cases the Congress legislates for the community, and there is no local self-government in which the people participate. Second, where by reason of its growth in population and the general progress of the people in intelligence and commerce Congress deems a circumscribed portion of the territory of the United States to be capable of local self-government and has accorded to it the usual and ordinary form of territorial government. The third stage of government for the territory of the United States is when a regularly established territory has so far progressed in population, education, and commercial importance as to be entitled to admission into the Union as a state.

It is undoubtedly true that the Congress, having plenary authority in the government of the territory of the United States, may in its wisdom establish such form of government as it may desire for territory of the United States embraced within defined boundaries. But according to natural traditions in respect to such matters the usual and ordinary form of government for a territory of the United States involves the establishment of a local legislature. And successively the several regularly established territories which have now become states or still exist as territories of the United
25 States have been "erected" by the Congress into territories by giving them local self-government, the best expression of which under our system of government is a local legislature. That feature of local government is the basis which the Congress has established for itself by general law for the organization of a territory of the United States in the sense in which that phrase is commonly used. In section 1846, Chapter I, Title XXIII, of the Revised Statutes it is provided that "The legislative power in each territory shall be vested in the governor and a legislative assembly." The qualifications of its members, their terms of office, their salaries, the method and term of their first election, are prescribed in the sections that follow. After the first election, as is provided in section 1848, "The time, place, and manner of holding elections by the people in any newly created territory, as well as of holding all such elections in territories now organized, shall be prescribed by the laws of each territory." And section 1851 provides that the legislative power of every territory "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

While the several acts creating the several territories may have included special provisions in conflict with these general provisions,

the underlying principle upon which the government in each regularly established territory has been based is a legislative assembly by which the people may work out their own policies, and have the opportunity, in the conduct of an elective and representative form of government, to prepare themselves for future statehood. A territory thus organized has a political dignity that does not belong to the first stage of government to which we have alluded. That form of government for the so-called organized territories has long been well understood in this country. It is that form of organized territorial government that the people of the district of Alaska have been demanding in the bills that have been presented to the Congress during the last few years for the purpose of erecting Alaska into a territory of the United States.

The distinction between a territory of the United States and the territory of the United States is well established and has been consistently maintained in our legislative history wherever accuracy of expression is observed in the statutes. A recent instance is found in the new penal code embodied in an act entitled "An act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909. In chapter 3, for example, there is a clear indication of the legislative understanding that the District of Columbia is not our only district. It is there provided that certain acts when committed in "any state, territory, or district" shall be punishable by certain designated fines or terms of imprisonment. This distinction between a territory and a district is again made in chapter 9 of the same code. In this strict and more accurate sense are the words "territory of the United States" used in the first section of the amended act to regulate commerce. Alaska is still inhabited to a considerable extent geographically by the Eskimo and Indian tribes. Its white population, considering the area of the country, is extremely small. So far the Congress has not considered its population sufficiently stable and homogeneous to maintain and support a local self-government. The Congress therefore continues to legislate for the people of Alaska and has not deemed it wise to accord to them the dignity of the second stage of progress toward statehood by making Alaska a territory of the United States. By statute that part of the public territory has been made the district of Alaska, and a government has been organized for it without a legislative assembly and in a form that differs little except in details from the government of the District of Columbia. The question then is whether this Commission may now deal with it as a territory of the United States. The District of Columbia has been expressly named in the act to regulate commerce. Shall the District of Alaska be brought within its provisions by mere construction?

26

Reference has been made to Binns v. United States, 194 U. S., 486, as conclusive authority for the proposition that Alaska is technically an organized territory. In the special sense in which it is so referred to in that case Alaska is organized, for it has a governor and other officials and a system of laws. But that it is not a territory of the United States regularly organized, either in the traditional or in the sense in which that phrase is used in the act to

regulate commerce, seems to be clear. The people of Alaska do not participate either in the making of the laws under which they live or in the selection of the several officials by whom those laws are enforced. They enjoy no semblance of the local self-government that is characteristic of the regularly organized territories as commonly understood.

There is much looseness of expression, as heretofore stated, in the legislation concerning Alaska. For this reason the cases in which its political status has been judicially considered must be examined in the light of the particular statutes to which they relate. In the case last mentioned the question at issue arose under an act of Congress providing a penal code for what the act itself refers to as the district of Alaska. Section 460 of Title II provided that any person or persons "prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain a license so to do." Subsequent provisions established penalties for the failure to comply with the terms of that section.

The plaintiff in error was convicted and, on writ of error to
27 the Supreme Court of the United States for a review of the record, the question before the court was whether under Article I of section 8 of the Constitution, providing that all duties, imposts, and excises shall be uniform throughout the United States, Alaska was to be deemed a territory. In the penal code, as in other statutes, Alaska is sometimes loosely referred to as a territory, but throughout the code, where accuracy is required, it is referred to as the district of Alaska.

In its opinion the court calls attention to the fact that the Congress has plenary authority, except as restrained by the Constitution, in all the territory of the United States, and that the form of government for different parts of the territory need not necessarily be the same. It says, as we understand the force and effect of the opinion, that Alaska is an organized territory as fully as the District of Columbia though having a different form of government. And so it is. Alaska in that broad sense is a territory, and it has a form of government. It is therefore an organized territory in the same broad sense. But its organic act, the statute under which its government was organized, differentiates it from the regularly organized territories as fully and completely as the District of Columbia differs from the regularly organized territories. Under that act there was created for the territory within the boundaries of the cession from Russia "a civil and judicial district to be known as the district of Alaska." It is, therefore, a "district" and not a "territory of the United States," just as completely as the District of Columbia is a district and not a territory in the accurate sense that must be assigned historically to that phrase. In other words, Alaska is a district, although when certain statutes have been under consideration the Supreme Court of the United States has also held it to be a territory.

The act to regulate commerce as amended applies its provisions to carriers engaged in the transportation of passengers or property "from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the

District of Columbia." Certainly the ruling in Binns v. United States, supra, which, as we understand it, deals with the District of Alaska as analogous to the District of Columbia, except in the details of its form of government, does not permit this Commission, when considering a statute that includes the District of Columbia by express reference, to include the District of Alaska within its provisions by mere construction.

While it has long been the tendency of courts, in the interest of justice, to enlarge their jurisdiction by construction in cases of reasonable doubt, a similar course on the part of an administrative or quasi legislative body such as this Commission is, would be of questionable propriety. Being a special tribunal, we ought not in
28 any event to enlarge our territorial jurisdiction by intendment, but ought to exercise our powers only under the clearly expressed authority of the statute; and this principle applies here with special if not controlling force in view of the fact that under the act of May 14, 1898, the power to regulate the rates of railroads in Alaska was conferred upon another branch of the government. In section 2 of that act it is provided:

That all charges for the transportation of freight and passengers on railroads in the district of Alaska shall be printed and posted as required by section six of an act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

With respect to the matter of the carriage of passengers and property by railroad, the subject-matter of the law administered by this Commission, the Congress has here directed in express and precise terms that the rates for such transportation within the district of Alaska shall be subject to regulation by one of the executive departments of Government. Although the Interstate Commerce Commission had then been in existence for more than ten years, and special reference is made in the section above quoted to the act under the authority of which it performs its duties, the power to revise freight and passenger rates in the "district of Alaska" was nevertheless vested in the Secretary of the Interior, and as we understand it has been exercised by that department. Even though Alaska has been loosely referred to in some statutes as a territory, and has been said by the Supreme Court of the United States to be a territory as that word is used in some acts, nevertheless with respect to the matter of transportation the Congress here in express terms defines it as the district of Alaska, and that is undoubtedly its official status and designation. Under these circumstances, and without some more definite warrant in the law than we have been able to find for holding that the district of Alaska is a territory of the United States within the meaning of section 1 of the act, we are unable to reach the conclusion that the power to revise and modify the rates of carriers by rail in the district of Alaska has been withdrawn from the Secretary of the Interior and now vests in this Commission. The act is supported and given vigor and efficiency by numerous penal provisions intended to secure obedience and to make it capable of real enforcement. Like

other criminal laws these provisions will be strictly construed by the courts, and confusion will necessarily attend any effort on our part to assert jurisdiction where it is not clearly conferred upon the Commission.

We therefore hold that we have no jurisdiction in the district of Alaska under the act to regulate commerce, as amended, and in reaching this conclusion we are not unmindful of the fact that the
29 Congress may readily confer that power upon us under clear povision of law, if that has been or is now its desire.

CLEMENTS, *Commissioner*, dissenting:

I am unable to concur in the majority opinion in view of several holdings of the Supreme Court, which I am convinced are diametrically opposed to the conclusions stated.

In Binns v. United States, 194 U. S., 486, the Supreme Court said:

It had been therefore held by this court in steamer Coquitlam v. United States, 163 U. S., 346-352, that "Alaska is one of the territories of the United States. * * *" Nor can it be doubted that it is an organized territory, for the act of May 17, 1884 (23 Stat., 24), entitled "An act providing a civil government for Alaska," provided "that the territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided. * * *"

It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a quasi state government with executive, legislative, and judicial officers and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the district. It may intrust to them a large volume of legislative power or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code, having created no legislative body and provided for no local legislation in respect to the matter of revenue; it has establishd a revenue system of its own, applicable alone to that territory.

Much emphasis is laid upon the fact that Alaska is not provided with a separate legislative assembly, and this is conceded to be the only other essential element necessary to constitute Alaska "an organized territory." I think it clear from the language used in Binns

v. United States, supra, that this is not essential to the status of "a territory." And to the same effect is National Bank v. County of Yankton, 101 U. S., 129, in which the court said:

The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations. * * *

Congress may not only abrogate laws of territorial legislatures, but it may itself legislate directly for the local government. * * * In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people under the Constitution of the United States may do for the states.

30 Let us consider what the word "organize" means. The Century Dictionary and Cyclopedia defines the word:

In general, to form into a whole consisting of interdependent parts; coordinate the parts of; systematize; arrange according to a uniform plan or for a given purpose; provide with a definite structure or constitution. Order.

What is an organic act? Simply an act prescribing and describing the limits of a territory, providing a government therefor, and usually ending with the words "is erected into a temporary government by the name of the Territory of Utah," etc.

No matter what the act of May 17, 1884, was called by Congress, whether its title was the "organic act" relating to Alaska, or some other, what did that act accomplish? That is the question upon which the status of Alaska is dependent. The answer is contained in a clause of the first section: "The government of which shall be organized and administered as hereinafter provided," and that act proceeded accordingly to organize as complete a system of government, the parts of which were "coordinated" and "systematized" and arranged accordingly to as "uniform a plan" and for as "definite a purpose" as was or is any territorial government of the United States. And by the act of June 6, 1900, 31 Stat., 321, Congress amplified and permanently established the civil government for Alaska. It was not necessary to prescribe the limits of the territory of Alaska in either of these acts—that had already been done in the treaty with Russia; it was simply necessary to give it such system of government as seemed best to Congress, and it was thereupon organized as a territorial government just as much as though Congress had said in so many words: "This shall hereafter be known as the organized territory of Alaska," and prescribed the limits of said territory by metes and bounds.

Usually there is a section of the so-called organic acts, under the head "legislative power," providing "that the legislative power and authority of said territory shall be vested in the governor and legislative assembly," but this feature is essentially a matter of discretion with Congress, which the courts have said may organize a territorial government as it sees fit, and the omission to provide a separate legislative assembly for Alaska in no way alters its status as a territory

with a completely organized system of government, with executive, legislative, and judicial functions, since Congress acts for Alaska in the place and stead of a local legislative assembly, as the courts have repeatedly held that that body may do.

For these reasons, I am unable to find any authority for the contention that the word "organized," as used in connection with a territory, necessarily signifies the existence of a separate legislative assembly. The language of the courts and of the statutes does
31 not point to that meaning, and certainly the common use of the word "organize" does not so signify. Whether its legislature be the Congress of the United States, acting for that territory directly, or a local assembly peculiar to the body politic of Alaska—if the legislative functions are exercised and all the other elements of government are there—an organized territorial government exists.

In United States v. Kazama, 118 U. S., 379-380, the Supreme Court says:

The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified or repealed at any time by Congress.

Now, since Congress can at any time withdraw, modify, or repeal any of the powers or functions which a territorial government exercises, it would be competent for Congress to abolish altogether the local legislative assembly in any existing organized territory. Suppose Congress in the exercise of its power should withdraw from New Mexico its assembly and should itself proceed to act directly as the sole legislature for that territory, without the intervention of any agency, leaving the governor, judiciary, and all the other elements of government untouched. Would this alter the status of New Mexico as an organized territory, revert it back to the status of an unorganized territory, and thus, ipso facto, cut off the application of the act to regulate commerce therein? It seems clear to me that such a result would not follow. Such action on the part of Congress certainly would not disorganize the government there because it would be just as completely organized with Congress acting as the local legislature as it is with a separate and independent legislative assembly.

It is contended that the several acts of Congress by the frequency with which they designate Alaska as the "district of Alaska" indicate that Congress does not regard it as a territory. But it will be found that the designation "territory of Alaska" is more frequently used, and that the instances in which it is used are significant that Congress intends to designate Alaska as a territory when speaking of it as a political unit, whereas the term "district" is used to refer to it as a "judicial district," a "customs-collection district," or as a "land-office district" of Alaska. For example, the act of May 17, 1884, was mainly devoted to the creation of a "judicial district," to extend the territorial district courts to Alaska to create a land-office "district," and to extend the land laws in a limited way to Alaska, and without accurately differentiating between the designation "territory of Alaska" as theretofore fixed by sections 1955-1957 of the Revised Statutes, 1878, and the term "district of Alaska," the latter term was

used in the act of 1884 to designate the extent of the "judicial district" and the "land-office district" of Alaska. In the sys-
32 tematic organization of New Mexico and every other territory, as well as Alaska territory, each of these "districts" exists, and their existence has never heretofore been supposed to abolish the political organization known as the "territory." When Congress has been called upon to legislate for the political organization of Alaska, it has used the usual political name and called it the "territory of Alaska." For example, the act of June, 1896 (29 Stat. L., 267), providing for the payment of clerk hire in the executive departments * * *, "is hereby extended to include the territories of Alaska and Oklahoma." In the act of May 14, 1898, conferring jurisdiction upon the Secretary of the Interior to regulate rates in Alaska, the term "district" is applied to Alaska, but this is simply in harmony with the use of that term by Congress, for the main purpose of this act was to extend the homestead laws to Alaska, and, as has already been stated, Alaska is concededly a land-office district.

It seems clear to me that Congress has expressly recognized the status of Alaska as a territory, subsequent to this act of May 14, 1898, by providing, under date of May 7, 1906, for the election of a Delegate to the House of Representatives from the territory of Alaska. Section 1862, United States Revised Statutes, 1878, provides that "Every territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the territory * * * ." It may be conceded that Congress has power to make an exception to this general legislative rule, but since May 7, 1906, the rule has been extended to the territory of Alaska, and in passing the act of that date, providing for a Delegate from the "territory of Alaska," the bill was expressly amended so as to use that designation instead of "district of Alaska," as first appearing in the title thereof.

It may also be remarked that Alaska, "as a territory," has been held to be entitled to the appointment of cadets to the Military Academy in an opinion by the Judge-Advocate-General of the United States, which was approved by the President. So that every department of the Government, executive, legislative, and judicial, has held Alaska to be a territory of the United States. Not a single court or department of the Government has declared the political status of Alaska to be that of a district, and the Commission in deciding that Alaska is not a "territory" repudiates precedents established not only by the Supreme Court, but by every branch of the Federal Government.

I fully agree that, as stated in the majority report, "The distinction between a territory of the United States and the territory of the United States is well established and has been consistently maintained in our legislative history wherever accuracy of expression is observed in the statutes." Accepting this pertinent observa-
33 tion as correct, the deliberate and accurate legislative expression declaring that the act of June, 1896, "is hereby extended to include the territories of Alaska and Oklahoma," each of

these is beyond question recognized as "a territory of the United States." To the same effect also is the accurate, unqualified, and authoritative declaration of the Supreme Court in the Binns case, that "Alaska is one of the territories of the United States."

The deliberate and discriminating use by Congress of the words "district" and "territory" in the act approved May 7, 1906, is most significant as to its understanding of the status of Alaska. The title of that act is as follows: "An act providing for the election of a delegate to the House of Representatives from the territory of Alaska." The record shows that the Senate having passed a bill providing for the election of a delegate to the House of Representatives from the "district of Alaska" and the House having amended the same by inserting the word "territory" in lieu of the word "district" the bill was considered in conference. The report of the managers on the part of the respective houses was submitted and agreed to, with the result that the words "territory of Alaska" were substituted for "district of Alaska" in the enacting clause and elsewhere where the whole domain of Alaska was referred to.

The Court of Claims in the case of Griggsby v. United States, 43 Ct. Cl., 426, said "Alaska is as much a domestic territory as Arizona."

It is beyond question that prior to the passage of the Hepburn Act the Commission had no jurisdiction of carriers or rates of transportation in Alaska. It is equally true that it had no jurisdiction in respect to intraterritorial transportation in New Mexico, Arizona, or any other territory; the original act did not undertake to regulate such transportation in any territory, but by the so-called Hepburn Act of June 29, 1906, the authority of the Commission was extended in general terms to such transportation in all territories and without specific reference by name to either of them.

Absolutely no reason has been suggested to show why this remedial act is not just as essential to the well-being of Alaska as to that of any other part of the United States, and if the expediency of its application is to have weight, I think it will not be seriously questioned that the process which it affords is as necessary to the proper regulation of intraterritorial rates, etc., in Alaska, and to the correction of wrongs, such as that complained of in this case, as in New Mexico or Arizona. Hence why should Congress in amending a law so as to make it more effective as a means of relief to the whole country exclude Alaska from its beneficent application?

The intention of this Government that Alaska should be incorporated into the United States and should thereby have the benefit of the Constitution and of all general laws passed by Con-
34 gress seems to have been manifested from the outset, for the treaty by which Alaska was acquired from Russia, declares, in article 3, that—

> The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property, and religion.

And subsequently Congress expressly declared in section 1954 of the Revised Statutes that—

The laws of the United States relating to customs, commerce, and navigation are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the 30th day of March, anno Domini 1867, so far as the same may be applicable thereto.

It must be apparent from the above provisions that Congress would not exclude this great territory from the benefits of a remedial statute without good and sufficient reason.

Neither do I believe that the limited authority of the Secretary of the Interior respecting rates in Alaska provided for in the law of May 14, 1898, when the status of Alaska was radically different from what it was when the amended act to regulate commerce was passed on June 29, 1906, throws light upon the question of the application of the act to that territory. The debates in Congress show that the only argument for investing the Secretary of the Interior with such authority in 1898 was that the decision of the Supreme Court in the so-called "Maximum Rate Case," rendered in the previous year, had so emasculated the act to regulate commerce that it had become ineffective. With the present law in full force all over the country and amended and strengthened largely because of that decision, can it be possible that Congress intended to deny its manifest benefits to this vast and important territory? Surely if we expect to find legislative enactments impelled by the wisdom and reason of men of common sense and having at heart the best interests of Alaska, it must be admitted that Congress could have had in mind no other thing than the application of this remedial statute in Alaska. There is no doubt in my mind that the general repealing clause contained in the act was intended to and did repeal the law of 1898, passed at a time of chaos so far as this subject was concerned, and which I regard as being only temporary in so far as it invested the Secretary of the Interior with authority over railroad rates in Alaska.

It is claimed that the law passed on May 14, 1898, is a "special" and the act to regulate commerce a "general" law. Upon this theory the argument is made that—

In passing a special act the legislature has its attention directed to the special case which the act was made to meet, and considers and provides for all the circumstances of that special case; and having done so, it is not to be considered that the legislature by a subsequent general enactment intended to derogate from the special provisions previously made where it was not mentioned in such enactment.

I think this argument is based upon an erroneous theory. True, the law of May 14, 1898, related solely to Alaska, but it dealt mainly with matters other than the regulation of railroad rates, and the provisions which it is claimed invests the Secretary of the Interior with and divests this Commission of such authority was added as an amendment to the law as it originally passed both Houses of Congress, and is a comparatively minor section. The law

of May 14, 1898, was therefore a general law, relating to diverse and unrelated subjects, whereas the act to regulate commerce of June 29, 1906 (the date upon which it was first extended to intraterritorial rates), is a special law, directed solely to the regulation of railroad rates, etc., and administered by one body to insure its uniform and efficacious application throughout the country.

While the Commission should not undertake to enlarge its jurisdiction beyond the clear provisions of the law, it ought not to hesitate to fully exercise its authority in the performance of the duties imposed upon it. There is no suggestion of doubt that the ends of justice require just as much the application of the same principles and regulation in Alaska as in New Mexico or Arizona. A narrow or overtechnical construction of the law should not be resorted to in any case to rid the Commission of the inconvenience and difficulty incident to the full performance of its duties.

Again, the refusal of the Commission to attempt the exercise of any authority over carriers in Alaska leaves those who would appeal to the Commission for the exercise of such authority in Alaska no means of getting the question before the courts for authoritative determination, since there is no appeal to the courts from a refusal of the Commission to make an order.

I am authorized to say that Commissioners Cockrell and Lane unite in this dissent.

36 *Rule.*

Filed July 22, 1910.

* * * * * * *

Upon consideration of petition of Humboldt Steamship Company and of the application of Charles D. Drayton, its attorney, filed this day praying for a rule to show cause why a writ of mandamus should not issue to the respondent, the Interstate Commerce Commission, requiring them to take jurisdiction of and hear and determine certain matters and things alleged in a certain proceeding now pending before said Commission and why it should not require the defendants in said proceeding to print, file, publish and keep open to public inspection their and each of their rates, fares and charges as required by the Act to regulate Commerce, it is this 22d day of July, 1910: Ordered:

That the said Interstate Commerce Commission be and they hereby are required to show cause why a writ of mandamus should not issue directing and commanding it to take jurisdiction of and hear and determine the matters and things stated in a certain proceeding now pending before it entitled "Humboldt Steamship Company vs. The White Pass and Yukon Route, et al.," being No. 2518 on the docket of the said Interstate Commerce Commission and commanding it to require the defendants in said proceeding to print, file, publish and keep open to public inspection their and each of their rates, fares and charges as required by the Act to regulate commerce

before the court on the 2nd day of August, 1910 at 10 o'clock
37 in the forenoon, or as soon thereafter as counsel can be heard. provided a copy of this rule be served on said Commission on or before the 26th day of July, 1910.

By the Court,

WRIGHT, *Justice.*

Marshal's Return.

Served a copy of within rule on Interstate Commerce Commission by service on Martin A. Knapp, Chairman, Personally, July 22nd, 1910.

AULICK PALMER, *Marshal.*

38 *Application for Additional Time to Answer.*

Filed July 29, 1910.

* * * * * * *

Comes now the Interstate Commerce Commission, by William E. Lamb, its attorney, and asks for additional time to answer the petition filed herein, and in support thereof states that on the 22nd day of July, 1910, complainant filed its petition praying that a writ of mandamus issue to the Interstate Commerce Commission requiring it to take jurisdiction of and hear and determine certain matters and things alleged in a certain proceeding claimed to be pending before said Commission wherein the Humboldt Steamship Company was complainant and the White Pass and Yukon Route, et al., were defendants; that on the 22nd day of July the court issued a rule for the Interstate Commerce Commission to show cause why said writ of mandamus should not issue as prayed, which said rule by its terms is returnable on the 2nd day of August, 1910, and requires respondent to answer the petition on or before said date.

Your applicant shows that he is one of the attorneys for the Interstate Commerce Commission authorized by it to represent said Commission in proceedings in court, and that he is the only attorney of said Commission with such authority now in Washington, and that prior to the service of the answer he had arranged to take the testimony of complainant's witnesses in a certain case entitled The Louisville & Nashville Railroad Company vs. The Interstate Commerce Commission pending in the Circuit Court of the United States
39 for the Western District of Kentucky, at Louisville, Ky., on the 3rd day of August, 1910; that to reach Louisville in time to be present at the taking of said testimony requires him to leave Washington on the night of August 1st. That other duties of said attorney have required his attention since the service of the rule and he has been unable to prepare the answer to the petition herein as required in time to be filed on the date of said order to show cause. That this application is not made for delay, and in further support thereof said applicant attaches hereto a stipulation entered into

between complainant and respondent in which the complainant, subject to the permission of the court, agrees that respondent may be given until August 22 in which to answer the petition and show cause why said writ of mandamus should not issue.

Wherefore the respondent asks that it be given until the 22nd day of August, 1910, in which to answer the rule and the petition of complainant.

WILLIAM E. LAMB,
Attorney for Interstate Commerce Commission.

CITY OF WASHINGTON,
District of Columbia, ss:

I, William E. Lamb, being first duly sworn, depose and say that I am one of the attorneys for the Interstate Commerce Commission, that I have read the foregoing application and know contents thereof, and the statements and allegations therein contained are true.

WILLIAM E. LAMB.

40 Subscribed in my presence and sworn to before me by the said William E. Lamb this 29th day of July, 1910.

[SEAL.] H. S. MILSTEAD,
Notary Public.

Upon reading the foregoing application it is ordered that defendant may have until Aug. 22 1910 to answer petition and rule to show cause in this case.

Dated Aug. 1, 1910.

WRIGHT, *Justice.*

Stipulation.

It is hereby stipulated by and between the parties hereto, subject to the approval of the court, that the Interstate Commerce Commission, respondent in the above entitled case, may have until the 22nd day of August, 1910, in which to answer the petition and the rule to show cause herein.

CHARLES D. DRAYTON AND
JOHN B. DAISH,
Attorneys for Petitioner.
WILLIAM E. LAMB,
Attorney for Interstate Commerce Commission.

41 Filed August 22, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52792.

THE UNITED STATES OF AMERICA ex Rel. HUMBOLDT STEAMSHIP COMPANY, a Corporation, Petitioner,
v.
THE INTERSTATE COMMERCE COMMISSION, Respondent.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

I.

Answering paragraph 1 of the petition, respondent denies that this honorable court has original jurisdiction in mandamus for
42 and in respect to the matters and things set forth in the petition herein, but disclaims information sufficient to form a belief as to whether or not petitioner is advised to the contrary.

II.

Respondent admits that the allegations contained in paragraphs 2 and 3 of the petition are true.

III.

Answering subdivision (*a*) of paragraph 4 of the petition, respondent admits that on May 26, 1909, the petitioner filed a petition in respondent's office as stated in said subdivision.

Respondent disclaims information sufficient to form a belief as to whether or not at the time said petition was filed in respondent's office as aforesaid petitioner was advised or is now advised that each of the defendants named in said petition was or is a common carrier engaged in the transportation of passengers or property by continuous carriage or shipment wholly by railroad or partly by railroad and partly by water between points in Alaska or between points in Alaska and points in the Dominion of Canada, but respondent denies that when said petition was filed in its office as aforesaid the defendants named therein were or that any of them was subject to the provisions of the act to regulate commerce.

In this connection respondent is informed and believes, and thereupon alleges, that during all the times mentioned in the petition

herein and now the defendants named in the petition filed in respondent's office as aforesaid were and are engaged in the
43 transportation of passengers and property as follows and not otherwise, namely: The Copper River & Northwestern Railway Company and the Pacific & Arctic Railway and Navigation Company were and are and each of them was and is engaged in the transportation of passengers and property wholly within the District of Alaska, and the British Columbia Yukon Railway Company, the British Yukon Railway Company, and the British Yukon Navigation Company (Limited) were and are and each of them was and is engaged in the transportation of passengers and property wholly within the Dominion of Canada.

Respondent admits that the proceeding instituted by the filing of a petition in its office as aforesaid is No. 2518 on the docket of respondent.

Respondent admits that the allegations contained in subdivision (*b*) of said paragraph 4 are true.

Respondent admits that the allegations contained in subdivision (*c*) of said paragraph 4 are true.

Respondent admits that the allegations contained in subdivision (*d*) of said paragraph 4 are true.

Respondent admits that the allegations contained in subdivision (*e*) of said paragraph 4 are true.

Respondent admits that the allegations contained in subvision (*f*) of said paragraph 4 are true, except that respondent alleges that the reasons given by it for its conclusions in the case referred to are not fully stated in said subdivision (*f*); therefore respondent refers the court for more full and complete information in this connection to the report of said case, which is Exhibit B to the petition herein.

44 Respondent admits that the allegations contained in subdivision (*g*) of said paragraph 4 are true.

IV.

Respondent admits that the allegations contained in paragraph 5 of the petition are true, except that respondent denies that the defendants named in the petition filed in respondent's office as aforesaid by petitioner were or are or that any of them was or is required by law to file with respondent and print and keep open to public inspection schedules showing their rates and charges for the transportation of passengers and property between points in Alaska or between points in Alaska and points in the Dominion of Canada or between any other places, except that by section 2 of an act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," it was and is provided that "all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section 6 of an act to regulate commerce as amended on March 2, 1889, and such rates shall be subject to revision and modification by the Secretary of the Interior," and respondent denies that said de-

fendants were or are or that any of them was or is required by law to comply with the provisions of said act to regulate commerce, except as stated in this paragraph.

45

V.

Answering the first subdivision of paragraph 6 of the petition, respondent disclaims information sufficient to form a belief as to whether or not petitioner is advised that the defendants named in the proceeding instituted before respondent as aforesaid are carriers subject to said act to regulate commerce, or advised that said defendants are required to print, file, or keep open to public inspection their rates, fares, and charges between the points named in the petition herein, or whether or not petitioner is advised that said defendants are subject under said act to the authority of respondent. In this connection respondent alleges that none of the carriers named as defendants in said proceeding is subject to said act to regulate commerce or to the jurisdiction of this respondent, or required by said act to regulate commerce to print, file, or keep open to public inspection its rates, fares, or charges between the points named in the petition herein.

Answering the second subdivision of said paragraph 6 this respondent disclaims information sufficient to form a belief as to whether or not petitioner is advised that respondent has exclusive jurisdiction in respect to numerous provisions of said act, or, particularly, with respect to matters and things stated in the petition filed in respondent's office as aforesaid, or whether or not petitioner is advised that respondent is charged with the duty of executing and enforcing each or every of the provisions of said act, or whether

46 or not petitioner is advised that when specifically charged with such duty respondent can exercise no discretion in respect thereto. In this connection respondent alleges that it has no jurisdiction over the matters or things stated in the petition filed in its office as aforesaid by petitioner and has no duty to perform in respect to such matters or things.

VI.

Answering the first subdivision of paragraph 7 of the petition, respondent is advised that the allegations contained in said subdivision are and that each of them is irrelevant and immaterial, and therefore respondent neither admits nor denies the truth of any of said allegations.

Respondent further alleges that this honorable court has no jurisdiction in this case and can not grant the relief or any of the relief prayed for by the petitioner in and by the petition herein, for the following reasons among others, namely: The subject-matter of complaint, as shown in and by said petition, is action which was taken by respondent in dismissing the petition in the proceeding instituted before respondent as aforesaid; said action required the exercise of judgment and discretion; in taking said action respondent exercised judgment and discretion; said action was taken in accordance with

authority conferred upon respondent by the act to regulate commerce; said action was taken after respondent had assumed and exercised jurisdiction in the premises; said action was taken after respondent had held a hearing at which all the parties to said proceeding
47 were and each of them was afforded a full and complete opportunity to present such testimony and other evidence, and to make such arguments as they, or any of them, might desire to have respondent consider and pass upon; at said hearing said parties, by their respective counsel, introduced much testimony and other evidence and made oral arguments; said action was taken, and an order dismissing the petition in said proceeding as aforesaid was made before this suit was instituted in this court, and said proceeding is not now, and was not at the time the petition herein was filed in this court, pending before respondent.

All of which matters and things said respondent is ready to aver, maintain, and prove, as this honorable court shall direct and thereby prays to be hence dismissed.

THE INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Solicitor.*

WASHINGTON,
District of Columbia, ss:

I, P. J. Farrell, Solicitor of the Interstate Commerce Commission, having read the foregoing answer and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

P. J. FARRELL,
Solicitor of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this, the 22d day of August, 1910.

[L. S.] H. S. MILSTEAD,
Notary Public.

48 *Motion for Leave to File Affidavits.*

Filed August 22, 1910.

* * * * * * *

Comes now the Humboldt Steamship Company, petitioner in the above entitled cause, and moves the Court for leave to file affidavit or affidavits, as it may be advised to show the value of the several rights claimed by the petitioner; and for leave to the respondent, if it be so advised, to file counter-affidavits.

CHARLES D. DRAYTON,
Attorney for Petitioner.

JOHN B. DAISH,
Of Counsel.

WASHINGTON, D. C., *August* 22, 1910.

P. J. Farrell, Esq., Attorney Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Please take notice that we will call the attention of the Judge presiding in the Circuit Court to the above motion on Friday, August 26th, 1910 at ten o'clock A. M. or as soon thereafter as counsel can be heard.

Yours very truly,

CHARLES D. DRAYTON,
Attorney for Petitioner.

JOHN B. DAISH,
Of Counsel.

Service of copy of the foregoing motion acknowledged this — day of August, 1910.

P. J. FARRELL,
Attorney for Respondent.

49 *Leave to File Affidavits of Value of Rights.*

Filed August 25, 1910.

* * * * * * *

Upon consideration of the motion of the petitioner herein, it is this 25th day of August, 1910,

Ordered, That the petitioner shall have five (5) days from and after this date in which to file affidavit or affidavits, as it may be advised, to show the value of the several rights claimed by the petitioner; and the respondent is hereby granted leave, if it shall be so advised, to file counter-affidavits in respect to the value of the rights claimed by the petitioner within seven (7) days from and after this date.

By the Court.

ASHLEY M. GOULD, *Justice.*

We consent to the passage of the foregoing order.

CHARLES D. DRAYTON,
Attorney for Petitioner.
P. J. FARRELL,
Attorney for Respondent.

50 *Affidavit of M. Kalish.*

Filed August 25, 1910.

* * * * * * *

M. Kalish, being first duly sworn, deposes and says that he is a citizen of the United States and a resident of the City of Seattle, State of Washington; that he is the Vice-President and General Manager of the Humboldt Steamship Company, a corporation, and

has general charge of the affairs of said corporation and is familiar therewith; that he has read the petition for writ of mandamus heretofore filed in the Supreme Court of the District of Columbia, to wit, on the 21st day of July, 1910, and is familiar with the matters and things in said petition set forth and also with the several rights of said petitioner therein stated; that the right of said petitioner to have the defendants in a certain proceeding before the Interstate Commerce Commission, entitled Humboldt Steamship Company vs. White Pass and Yukon Route et al., being No. 2518 on the Docket of said Commission, print, file and keep open to public inspection their and each of their rates, fares and charges as required by law, is of a pecuniary value to said petitioner of a sum in excess of Five thousand dollars and that by the denial of said right, petitioner has been and is damnified in a sum exceeding Five thousand dollars; that the right of petitioner to have the said Interstate Commerce Commission, pursuant to law, establish through routes and joint rates, as in petitioner's complaint in said proceeding No. 2518 prayed, is of a pecuniary
51 value to petitioner of a sum in excess of Five thousand dollars and that by the denial of said right to through routes and joint rates the petitioner has been and is damnified in a sum in excess of Five thousand dollars; and that the value of the right of the petitioner to have the said Interstate Commerce Commission prevent the defendants aforesaid from carrying into force and effect certain contracts or agreements to prevent by change of time schedule, carriage in different cars and by other means and devices, the carriage of freights from being continuous from and to certain places as in said proceeding No. 2518 prayed exceeds the sum of Five thousand dollars and that by the denial of said right by the said Commission the petitioner has been and is damnified in a sum exceeding Five thousand dollars.

M. KALISH.

Subscribed and sworn to before me this 12th day of August, 1910.

[SEAL.] CHARLES F. MUNDAY,
Notary Public, State of Washington.

My commission expires Jan'y 18, 1914.

52 Filed January 6, 1911.

In the Supreme Court of the District of Columbia.

No. 52792. Law.

THE UNITED STATES ex Rel. HUMBOLDT STEAMSHIP COMPANY, Plaintiff,

v.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

Opinion of the Court.

The Humboldt Steamship Company, a corporation, presents its petition herein asking for the writ of mandamus to be issued by

this court to require the respondent, The Interstate Commerce Commission, to take jurisdiction over common carriers in Alaska, and directing it to execute and enforce the act of Congress of February 4, 1887 (24 Statutes-at-Large, 379), as amended by later acts (25 Statutes-at-Large, 855; 26 Statutes-at-Large, 743; 28 Statutes-at-Large, 643; 34 Statutes-at-Large, 584; 34 Statutes-at-Large, 838), within the said Territory of Alaska; and for general relief.

The petition states that the relator is a corporation organized
53 under the laws of California, and is a common carrier engaged in the transportation of passengers and property by steamship between Seattle, in the State of Washington, and Skagway, Alaska, and between other places.

That the respondent is an administrative, quasi-judicial tribunal, created by virtue of said act of Congress; and by section 12 of said act the respondent is charged with the duty of excluding the provisions of said act.

That on May 26, 1909, the relator filed a petition in the office of the respondent against the White Pass & Yukon route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, Limited. That said defendants are common carriers engaged in the transportation of passengers and property by continuous carriage, or shipment wholly by railroad, or partly by railroad and partly by water, between points in Alaska, and between points in Alaska and points in the Dominion of Canada, and as such common carriers each was and is subject to the provisions of the said act to regulate commerce. That said proceeding is number 2518 on respondent's docket.

The defendants in said proceeding answered, and The Copper River & Northwestern Railway Company intervened as party defendant; and Miller-Reed-Pease Company, A. D. Blowers & Co., Inc., H. S. Emerson Co., and Sunde & Erland Co., all of Seattle, in the State of Washington, intervened as plaintiffs.

A hearing was had October 7, 1909, at Seattle, and oral arguments were made; and thereafter briefs were filed on behalf of the petitioner, the defendants, and interveners; and on July 6, 1910, the respondent herein filed a report and an order in said proceeding, dismissing the complaint of the petitioner.

That said report is in vol. 19, page 105, of the Interstate Commerce Commission Reports, and a copy is made Exhibit A with the petition herein.

54 That the conclusion of the respondent in said proceeding is based upon an original inquiry made by the said Commission, entitled "In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska," found in vol. 19 of said reports, page 81, and a copy thereof is made Exhibit B with the petition.

The said report consists of a majority report written by Commissioner Harlan and a dissenting opinion by Commissioner Clements, in which dissent Commissioners Cockrell and Lane concur, the majority report holding in substance that Alaska is not a Territory of the United States in the sense in which that phrase is used in said

act to regulate commerce, as amended, and that therefore the respondent has no authority or jurisdiction over carriers operating in Alaska.

The relator being advised that the said report and order in said proceeding were erroneous, on July 16, 1910, filed a petition for a rehearing, alleging that the respondent had erred, as matter of law, in holding that it is without jurisdiction over carriers operating in Alaska, which petition for a rehearing was denied July 19, 1910.

The relief sought in said proceeding number 2518 was that inasmuch as the defendants had failed to file with the respondent herein, and print, and keep open to public inspection, schedules of rates, fares, and charges, in the form prescribed by said act, between points in Alaska and in the Dominion of Canada, and other places, that the respondent should direct said defendants to print, file, publish, and keep open to inspection such schedules. That the said defendants should establish through routes and joint rates, in conjunction with the petitioner, between certain named places in Alaska and Seattle, and should afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and to cease and desist from preventing, by sundry devices, the carriage of freights from being treated as one continuous carriage from
55 place of shipment to place of destination, when such freights were handled by the Humboldt Steamship Company.

The relator is advised that each of the carriers named as defendants in said proceeding is subject to said act of Congress and, being so subject, is required to print, file, and keep open to public inspection its rates, fares, and charges; and is subject to all the provisions of said act.

The relator is also advised that the respondent has exclusive jurisdiction in respect to numerous provisions of said act, and particularly with respect to the matters and things stated in the petition in said proceeding before said respondent; and it is charged with the duty of executing and enforcing each and every of the provisions of said act, and that it can exercise no discretion in respect to such duty.

That the relator has no appeal from the decision of said respondent in said case, and its petition for rehearing having been denied the relator is without remedy in respect to the matters and things alleged in said original petition before the respondent except by application to this court for the writ of mandamus.

On the filing of this petition, verified by the affidavit of the relator's attorney, a rule to show cause was issued, and the Interstate Commerce Commission filed an answer, in which it denies that this court has original jurisdiction in mandamus in respect to the matters set forth in the relator's petition herein; and it denies that the said corporations named in the proceeding filed by the relator before it are subject to the provisions of the said act to regulate commerce; and the respondent alleges, on information and belief, that the said Copper River & Northwestern Railway Company and the Pacific & Arctic Railway & Navigation Company, at the times mentioned in the said petition, were, and still are, engaged in the transporta-

tion of passengers and property wholly within the District of Alaska; and The British-Columbia Yukon Railway Co., The British-Yukon Railway Co., and The British-Yukon Navigation Co., Ltd.,
56 were, and are, engaged in the transportation of passengers and property wholly within the Dominion of Canada.

It denies that the said defendants named in the said petition, or any of them, were, or are, required by law to file with the respondent, and print and keep open to public inspection, schedules showing their rates and charges, except that under the provisions of the act of Congress of May 14, 1898, entitled "An act extending the homestead laws, and providing for right of way for railroads in the District of Alaska, and for other purposes," it was provided that all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted, as required by section 6 of the act to regulate commerce, as amended on March 2, 1889, and such rates shall be subject to revision and modification by the Secretary of the Interior; and the said respondent denies that the said defendants, or any of them, were required by law to comply with the provisions of said act to regulate commerce except as above stated.

Said respondent further alleges that this court has no jurisdiction to grant any of the relief prayed for in this case, because the subject-matter of complaint is the action taken by the respondent in dismissing the relator's petition in the said proceeding before it, and that said act required the exercise of judgment and discretion, which the respondent exercised in the premises, in accordance with authority conferred upon it by said act, after respondent had assumed and exercised jurisdiction in the premises, and, after a hearing, at which all the parties to said proceeding had a full and complete opportunity to present evidence and make arguments, and after said parties had introduced much testimony and evidence and made oral arguments, and before this suit was instituted in this court, and because said proceeding was not pending at the time the petition in this court was filed and is not now pending.

On the filing of this answer, on August 22, 1910, appli-
57 cation was made by the relator for leave to file affidavits as to rights, which leave was granted on August 25, 1910; and thereupon an affidavit was filed, made by one M. Kalish, stating that he is a citizen of the United States and a resident of Seattle, State of Washington; that he is the vice-president and general manager of the Humboldt Steamship Company, a corporation, and has general charge of the affairs of said corporation; that he has read the petition filed herein on July 21, 1910, and is familiar with the matters therein stated; that the right of said petitioner to have the defendants in the said proceeding before the Interstate Commerce Commission referred to therein, being number 2518 on the docket of said Commission, print, file, and keep open to public inspection their rates, fares, and charges, as required by law, is of a pecuniary value to the relator of a sum in excess of $5,000, and that by the denial of said right petitioner is damnified in a sum exceeding $5,000; that the right of petitioner to have said Interstate Commerce Commis-

sion, pursuant to law, establish through routes and joint rates, as in petitioner's complaint prayed, is of a pecuniary value to the petitioner of a sum in excess of $5,000, and that the value of the right of petitioner to have said Commission prevent the said defendants from carrying into force and effect certain contracts or agreements to prevent, by change of time, schedule, carriage in different cars, and by other means and devices, the carriage of freights from being continuous, as therein prayed, exceeds $5,000, and that the denial of said rights by said Commission has in each instance damnified him in a sum exceeding $5,000.

Issue was joined on the respondent's answer, and the case came on for hearing on the record made by the petition and exhibits, the answer, and the affidavit above referred to.

Counsel have filed carefully prepared briefs, and the court has considered the same, and will now state its conclusions.

It seems clear that the respondent has failed to pass upon the merits of the proceeding instituted by the relator before it
58 in number 2518, for the reason that the previous investigation of the Commission had satisfied a majority of the members that they had no jurisdiction over common carriers in Alaska. They expressly refrained from passing judgment upon the merits of the controversy, because they held the Commission is without jurisdiction to make the order sought by the complainant, and they held this upon authority of the decision announced "In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska," reported in 19 Interstate Commerce Commission Reports, 81.

On examination of that report, it will appear that four of the Commissioners were of that opinion, and that three were of the opinion that the Commission did have jurisdiction.

One of the grounds stated in the majority opinion, which is claimed as authority for holding that the Commission was without power in the premises, is the fact that on May 14, 1898, Congress passed a law extending to Alaska the homestead laws of the United States (30 Statutes-at-Large, 409), and therein providing for the right of way for railroad companies, and other roads; and by section 6 also provided for posting toll, freight, and passenger charges, to be approved by the Secretary of the Interior; and by section 2 provided that all charges for transportation of freight and passengers on railroads in Alaska shall be printed and posted, as required by section 6 of the act to regulate commerce, as amended on March 2, 1889 (24 Statutes-at-Large, 379; 25 Statutes-at-Large, 855), and which rates shall be subject to revision and modification by the Secretary of the Interior.

When this act was passed, requiring compliance by the railroad carriers in Alaska with the provisions of the Interstate Commerce law as to publicity of rates, and providing that the Secretary of the Interior should have authority over the same, the Commission, as I understand, had no jurisdiction within the lines of any State or Territory; but, afterward, by the act of June 29, 1906 (34 Statutes-at-Large, 584), it is claimed that a general power was given
59 to the Commission to regulate intra-territorial rates, and that said law necessarily repealed the act of May 14, 1898, in so

far as it authorized the Secretary of the Interior to approve such rates in the Territory of Alaska.

I think I should be constrained to hold with the minority report of the Commission on that proposition, if compelled to pass upon it.

Another point made by the majority of the Commission, which seemed to determine them in declining to take jurisdiction in Alaska, is the use of the word "District," instead of the word "Territory," in numerous acts concerning Alaska.

My construction of the said acts referred to, and my reading of the various opinions of the Supreme Court of the United States, in relation thereto, would incline me to believe that there is nothing conclusive in that argument. Whether called "District" or "Territory," can make no difference on the question as to whether it is an organized portion of the domain of the United States; and the language of the various acts referred to seems sufficiently broad to include Alaska, as well as all other Territories, whether a local legislature is provided for them, or not, if they are otherwise governed under acts of Congress; and I should be disposed to hold that the Interstate Commerce Commission has ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory, and over those carriers operating between the State of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction, I think no one could successfully question their right to do so.

Entertaining these views, if this court were sitting as an appellate court, and had jurisdiction to hear appeals from the Interstate Commerce Commission, I should feel constrained to reverse their decision in the said proceeding number 2518, and to require
60 them to pass upon the merits of the controversy therein described. Mandamus, however, cannot be used as a writ of error, or appeal; and the court has no appellate jurisdiction to review the decisions of the Interstate Commerce Commission.

The question here, as it seems to me, is, whether this court should issue a writ of mandamus to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach?

The writ of mandamus is an extraordinary writ that is to be issued only where the party applying for the same has a clear legal right to the relief he claims, which he cannot obtain by any other proceeding. He must not only have a clear legal right, but there must be a clear legal duty on the part of the respondent, which he refuses to perform, and that duty must be ministerial in its character, and in no degree discretionary.

Can it be said that the legal duty is clear when a commission composed of seven gentlemen well versed in the law are divided in opinion as to that duty, four to three? And if the relator's right depends on the construction of the law, about which there is such difference of opinion among judges, can it be said that he has a clear legal right to the relief demanded?

I have no doubt that this court has jurisdiction to grant the writ of mandamus against the Interstate Commerce Commission, provided the case made is sufficiently clear; but there seems to me too much doubt as to the relator's right, and as to the respondent's duty, to warrant the exercise of that jurisdiction by the court in this case.

The relator has no other remedy, and if the case were plain, the court would not hesitate to issue the writ as prayed; but where
61 there is any reasonable doubt of the existence of the essential conditions above stated, the court should decline to issue the writ of mandamus.

U. S. ex Rel. Warden v. Secretary of the Navy, 2 Mackey, 527.
U. S. ex Rel. Brodie v. Seymour, 10 Appeals D. C., 567.
Reeside v. Walker, 52 U. S., 271.
U. S. v. The Commissioner, 72 U. S., 563.
Supervisors v. U. S., 85 U. S., 71.
U. S. ex Rel. Dunlap v. Black, 128 U. S., 40.
U. S. ex Rel. Redfield v. Windom, 137 U. S., 636.
U. S. ex Rel. Boynton v. Blaine, 139 U. S., 306.
Northern Pacific Railroad Company v. Washington Territory ex Rel. Dustin, 142 U. S., 492.

The prayer for relief will be denied in this case, and the petition dismissed.

JOB BARNARD, *Justice.*

[Endorsed:] No. 52,792. Law. The United States ex Rel. Humboldt Steamship Company, plaintiff, v. The Interstate Commerce Commission, respondent. Copy of opinion of court.

62 Supreme Court of the District of Columbia.

FRIDAY, *Jnuary 6th,* 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * * * *

This cause came on to be heard upon the Petition filed herein, the Rule to Show Cause, issued thereon, the Answer of Respondent, and affidavits; was argued and submitted. Upon consideration whereof, it is ordered that the prayers of the petition be and they are hereby denied, the said Rule discharged and the petition dismissed with costs. Whereupon it is considered that the respondent therein recover of petitioner herein its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the petitioner by his attorneys of record, in open court, notes an appeal to the Court of Appeals of the District of Columbia; whereupon the penalty of a bond for costs is fixed in the sum of One Hundred Dollars.

Memorandum.

January 26, 1911.—Appeal bond approved and filed.

63 *Directions to Clerk for Preparation of Transcript of Record.*

Filed January 26, 1911.

* * * * * * *

The Clerk of said Court will prepare record on appeal and include therein the following: Petition & Exhibits A. & B. Rule to show cause; Motion for additional time to answer and Affidavit and Stipulation; Order of August 1, 1910; Answer; Motion for leave to file additional affidavits; Order thereon; Opinion of January 6, 1911; Judgment; Memorandum of appeal bond and this designation.

JOHN B. DAISH,
Attorney for Humboldt Steamship Company.

64 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 63, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52792 at Law, wherein The United States of America, ex rel. Humboldt Steamship Company, a corporation, is Petitioner and The Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of February, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2276. The United States of America ex rel. Humboldt Steamship Co., &c., appellant, vs. the Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Feb. 16, 1911. Henry W. Hodges, clerk.

44 Thursday, April 6th, A. D. 1911.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT Steamship Company, a corporation, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION.
No. 2276.

The argument in the above-entitled cause was commenced by Mr. Chas. D. Drayton, attorney for the appellant, and was continued by Mr. John B. Daish, attorney for the appellant.

Friday, April 7th, A. D. 1911.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT Steamship Company, a corporation, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION.
No. 2276.

The argument in the above-entitled cause was continued by Mr. John B. Daish, attorney for the appellant, and by Mr. P. J. Farrell, attorney for the appellee, and was concluded by Mr. Chas. D. Drayton, attorney for the appellant. On motion each side is allowed five days file an additional brief herein, is so advised.

45 No. 2276.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP Company, a corporation, appellant,

v.

THE INTERSTATE COMMERCE COMMISSION.

OPINION.

Mr. Justice Van Orsdel delivered the opinion of the court:

This action was brought in the Supreme Court of the District of Columbia by appellant, relator below, praying for the issuance of a writ of mandamus to require the respondent, Interstate Commerce Commission, to take jurisdiction and act upon a certain case pending before it which involves primarily its power, under the interstate commerce act, to regulate commerce within the Territory of Alaska. For convenience the appellant will be referred to as relator and appellee as the commission.

It appears that relator filed a petition in the office of the Interstate Commerce Commission asking for the establishment of through routes and joint rates between its steamship lines operating between Seattle, Washington, and Skagway, Alaska, and the White Pass and Yukon Railway Company, consisting of the Pacific and Arctic Railway and Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation

Company (Ltd.). After hearing testimony and arguments the commission rendered a decision dismissing the petition for lack of jurisdiction, basing its decision upon the sole ground that Alaska is not "a Territory of the United States" within the provisions of the interstate commerce act.

Relator petitioned for a rehearing, which was denied, whereupon this suit was instituted in the court below praying that a writ of mandamus issue requiring the commission to take jurisdiction of the matters set forth in relator's petition.

The commission answered, admitting all the material facts averred in the petition, but denying the original jurisdiction of the Supreme Court of the District of Columbia in respect of the matters and things set forth in the petition, and also denying that the defendant companies in the proceeding before the commission are subject to the provisions of the interstate commerce act. On hearing upon petition and answer the court entered a judgment denying the relief sought and dismissing the petition. From the judgment so entered this appeal is prosecuted.

Three propositions are presented by the appeal: First, has the Interstate Commerce Commission jurisdiction to consider the case in question; second, has the Supreme Court of the District of Columbia jurisdiction to compel the commission by writ of mandamus to consider a case in which it has refused to proceed on the ground of want of jurisdiction; and if so, third, can the commission be compelled to assume jurisdiction of the present case?

The commission refused to take jurisdiction of the case presented by the petition of the relator company for the reason, as set forth in the majority opinion, that Alaska is not a Territory of the United States within the meaning of the interstate commerce act. By the act of Congress of June 29, 1906 (34 Stats. L., 586), the provisions of the interstate commerce act were extended to apply "to any common carrier or carriers engaged in the transportation of passengers wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a point of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or in an adjacent foreign country."

By the same act it was provided that "the commission shall also, after hearing on a complaint establish through routes and joint rates

as the maximum to be charged and prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

This act is the expression of a comprehensive design on the part of Congress to generally regulate interstate and territorial commerce throughout the entire territory incorporated within the limits
46 of the United States. The power conferred upon Congress "to regulate commerce with foreign nations, and among the several States and with the Indian tribes" (Const., Art. I, sec. 8, cl. 3) is unlimited within its domain. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." (Gibbons v. Ogden, 9 Wheat., 1.) Congress has power to delegate to an administrative body, as exemplified in the Interstate Commerce Commission, authority to establish general regulations for the control of common carriers engaged in such commerce and to impose upon the courts power to enforce such regulations. This general power, exercised in the manner suggested, will be interpreted to extend to all sections of the country that can be embraced reasonably within its provisions. If by liberal and proper construction of the act Alaska can be held to be included within its provisions, we deem it to be our duty to so rule. (Chicago, M. & St. P. Ry. Co. v. Voelker, 129 Fed., 522.)

Both in the majority opinion of the commission and in the argument at bar much stress was laid upon the term "organized Territory." In fact, the case, in the opinion of the commission and of counsel, seems to turn upon whether or not Alaska is an organized Territory of the United States. We are not impressed with this distinction. The power of Congress to deal with Territories under Article IV, section 3, of the Constitution is so general and unlimited that the character of government afforded the people of a Territory is wholly immaterial so long as its inhabitants are protected in their constitutional rights. In the case of Rassmussen v. United States, 197 U. S., 516, it was argued that Alaska was not an organized Territory of the United States, because Congress, in extending the Constitution to what it designated as the organized Territories (R. S., sec. 1891), did not include Alaska. The court, deciding the question there involved on the ground that Alaska is a Territory incorporated into the United States by the terms of the treaty of cession from Russia, dismissed the contention by holding that the acts of Congress extending the Constitution to the incorporated Territories therein named were "declaratory merely of a result which existed independently by the inherent operation of the Constitution." The particular manner in which a Territory has been organized by Congress is of

little importance, but the question of its incorporation as a part of the United States is all-important in determining its status as a Territory of the United States.

A sharp distinction has been made in Downes v. Bidwell, 182 U. S., 244, and later affirmed in Dorr v. United States, 195 U. S., 138, between territory which, either by the terms of the treaty by which it was acquired, or by express act of Congress, has been incorporated into the United States and territory that has not been so incorporated. In the Dorr case this distinction is summed up as follows: "Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (Downes v. Bidwell) that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation. . . . If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing, for it is expressly provided that (Article IX) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions."

In Downes v. Bidwell, supra (p. 335), Mr. Justice White, in a concurring opinion, referring to the status of Alaska as compared with the Philippines, said: "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico, as just stated." And in the same case, Mr. Justice Gray, in his concurring opinion, said: "The cases now before the court do not touch the authority of the United States over the Territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State."

In the case of Steamer Coquitlam v. United States, 163 U. S., 346, a suit in admiralty was brought in the District Court of Alaska to enforce a forfeiture for violating the revenue laws of the United States. The jurisdiction of the Circuit Court of Appeals of the Ninth Circuit was challenged on the ground that the Alaska court was not a district court within the meaning of the Judiciary Act of 1891. On this point the court said: "Alaska is one of the Territories of the United States. It was so designated in that order (referring to the order of the Supreme Court assigning Alaska to the Ninth

Circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory."

In Rassmussen v. United States, supra, the court, considering whether or not the right of trial by jury, as guaranteed by the Sixth Amendment to the Constitution, extended to Alaska, clearly defined the legal and political status of that Territory as follows: "It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the Sixth Amendment."

It follows, therefore, that a subdivision of the territory of the United States that has been incorporated into the United States, as Alaska has been, and provided by Congress with a civil
47 government, is a Territory of the United States. In the principal acts of Congress relative to the establishment of civil government in Alaska (act of May 17, 1884; R. S., 1 Supp., chap. 53, p. 430; act of June 6, 1900; 31 Stats. L. 321), together with numerous other acts relating to Alaska (R. S., secs. 1954–1957; 27 Stats. L., 955; 29 Stats. L., 267; 30 Stats. L., 409, 1253; 31 Stats. L., 321; 33 Stats. L., 616, 1265; 34 Stats. L., 169, 963), it is referred to both as a Territory and as a District, but this we deem unimportant. The government of Alaska to-day is as complete in its operation and in its legal and constitutional bearings as any that has ever been provided for a Territory. It is no less a Territory of the United States because Congress, instead of providing it with a local legislature, supplies that necessity itself. In National Bank v. County of Yankton, 101 U. S., 129, the court, defining the power of Congress to legislate for the Territories, said: "The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. . . . Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. . . . In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

Congress, in the government of the Territories, has plenary power except as limited by the Constitution. The particular form of government it shall establish is not prescribed. It has, for example prescribed one form of government for New Mexico, another for the

District of Columbia, and still another for Alaska. In New Mexico, as in most of the Territories that have in the past been created and organized by Congress, a government resembling in many respects that of the States has been established, with executive and judicial officers and a local legislature elected by the people of the Territory. While Congress in the government of the District of Columbia is limited by provisions of the Constitution not applicable to other territory of the United States, the same power exists of establishing local government. The mere fact that a legislature elected by the people of the District of Columbia has not been provided—Congress reserving to itself, as in Alaska, that function—does not operate to deprive the District of Columbia of an organized form of civil government. It follows that since Congress may legislate directly in respect of the local affairs of a Territory, Alaska, which has been provided with executive and judicial officers and a civil and penal code, has a complete system of civil government, and is an organized Territory of the United States. Binns v. United States, 194 U. S., 486.

The interstate-commerce act is remedial legislation for the regulation of common carriers engaged in commerce in all parts of the United States where such regulation in the mind of Congress is necessary. The act uses the unqualified term "Territories of the United States," which can only refer to what are known as the Territories incorporated into and belonging to the United States in which civil government has been established and in which the operation of the commerce act would be beneficial. Every reason exists for the inclusion of Alaska. There is much traffic between its shores and the ports of the Pacific seaboard. Railroads are being built and projected into the interior of Alaska to accommodate the growing commerce due to the rapid development of the country. Every argument, therefore, favors the intent of Congress by its latest act to include this Territory within the jurisdiction of the Interstate Commerce Commission.

The common law jurisdiction of the Supreme Court of the District of Columbia, sitting as a circuit court, to issue a writ of mandamus against an officer of the Government in a proper case will be conceded. It likewise follows that similar power is vested in the court to command the performance of a duty purely legal and in which no act of judgment or discretion is involved by an official board or commission of the Government. This power has been so long and so frequently exercised as to admit of no doubt of the existence of the authority. Kendall v. United States, 12 Pet., 524; Decatur v. Paulding, 14 Pet., 497; United States v. Schurz, 102 U. S., 379; Garfield v. Goldsby, 211 U. S., 249; Parrish v. McVeagh, 214 U. S., 124.

This brings us to consider whether this case is one calling for the exercise of jurisdiction by mandamus. Blackstone in his Commentaries, vol. 3, 110, defines the writ of mandamus to be "a command issuing in the King's name from the Court of King's Bench, and

directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice." Before this extraordinary process will issue it must appear that the Interstate Commerce Commission is an official body to whom, on legal principles, the writ may be directed. It also must appear that the relator is without any other legal remedy. Referring to the latter point, when relator's complaint was dismissed for lack of jurisdiction by the commission it applied for a rehearing, as provided in the interstate-commerce act. When that application was denied relator had no specific remedy, either in law or equity, except by mandamus.

We must now inquire into the official status of the commission against whom we are asked to direct the issuance of this writ. While the powers conferred upon the commission are exceedingly broad and of the utmost importance, they are only such as Congress in its legislative capacity possesses. It has power to require that transportation charges for passengers and property must be just and reasonable; that freight shall be properly and reasonably classified; that rebates and discriminations, undue and unreasonable preferences, pooling of freight and division of earnings, shall not exist. It has power to regulate the long and short haul; to require the posting and filing of schedules of rates, the publication of rates, and the regulation of joint tariffs between companies owning or operating connecting lines; to require railroad companies to construct and maintain switches and connections with lateral or connecting lines of roads; to establish through routes and just and reasonable rates applicable thereto, and, in fact, to conduct hearings and make orders
48 generally regulating commerce within the express limitations of the commerce act.

Severe penalties are prescribed for the violation of the duties and obligations imposed by the act and for the failure of a carrier to comply with the orders of the commission. But the act specifically provides that any violation of its penal provisions "shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted." (32 Stats. L., 847; 36 Stats. L., 547.) In respect of the enforcement of the orders of the commission, it is provided that "if any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission, or any party injured thereby, or the United States by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If after hearing that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representa-

tives from further disobedience of such order or to enjoin upon it or them obedience to the same." (36 Stats. L., 555.)

Thus it will be observed that by the provisions of the last general act of Congress conferring power and jurisdiction upon the Interstate Commerce Commission, the Commerce Court was created. Cases from the commission do not reach that court by the usual avenue of appeal, but by original proceedings to enforce or restrain the orders of the commission. A careful review of the acts conferring jurisdiction upon the commission fail to disclose the bestowal by Congress upon it of any of those powers to enter judgments and decrees belonging to courts of general jurisdiction. Its acts are administrative and not judicial. Like all executive and administrative officers and boards of the Government, it possesses quasi judicial functions which require the exercise of judgment and discretion in deciding questions of fact and applying the law thereto as defined in the statutes. But it takes more than this to make a court of general or special jurisdiction. The power that resides in courts to enter final judgments and decrees and to enforce them is wanting in this commission. Its duty is confined to administering powers conferred in Congress by the commerce clause of the Constitution and delegated under proper limitations to the commission to administer.

It is insisted that the commission, in arriving at a decision that it was without jurisdiction to consider relator's complaint, exercised judicial discretion and that mandamus will not lie to compel it to take jurisdiction. After the petition was filed by relator, evidence was taken and a hearing had at which arguments were made. It was upon consideration of the case so presented that a decision was reached by the commission that it was without jurisdiction in the premises. It is elementary law that a writ of mandamus will issue to require an inferior court to assume jurisdiction of and decide a matter within its jurisdiction and pending before it for judicial determination, but the writ will not issue to control its decision. (Ex parte Flippin, 94 U. S., 348; Ex parte Railway Co., 101 U. S., 711; Ex parte Burtus, 103 U. S., 238; Ex parte Morgan, 114 U. S., 174.)

It is well settled that where the question of jurisdiction is a peremptory one enjoined by law it matters not that the officer, board, or tribunal may have granted a hearing before deciding that issue. If jurisdiction depended upon the ascertainment or determination of some preliminary fact or facts, the case would be different. It would not in that instance be solely a question of law, and mandamus would not lie to direct the action that should be taken in deciding the preliminary issues of fact. In determining whether or not an officer, tribunal, commission, or board has jurisdiction to act in a given case, there can be no such thing as preliminary or temporary assumption of jurisdiction where no jurisdictional facts are involved. When jurisdiction is expressly imposed by law, no amount of preliminary inquiry to determine that question can deprive the party injured by an erroneous ruling thereon of his right to have such ruling corrected,

and in the absence of any other legal remedy he is entitled to the relief afforded by mandamus.

In the case at bar the power of determining in what particular territory the commission shall exercise jurisdiction is not left to its discretion. No question of fact is involved in its determination. Its jurisdiction in that respect is defined by the positive declaration of the law-making power. It is purely a question of law and not one of fact or of mixed law and fact. No exercise of discretion by the commission in its administrative capacity is involved in passing upon the extent of its territorial jurisdiction under the act of Congress. It matters not, therefore, the extent of the hearing indulged by the commission in this case before it arrived at the conclusion that it was without jurisdiction. The law is mandatory upon it to take jurisdiction within the territorial limits defined in the act. It is the power of the commission to act that is before us and not the expediency or manner in which it shall act under the jurisdiction imposed. It logically follows from the contention of counsel for the commission that if its decision that it is without jurisdiction in Alaska is not reviewable by the courts it is within its power to declare itself without jurisdiction in Ohio, and such a decision would be for the same reason beyond correction by the courts. The same reasoning ultimately leads to the conclusion that it is within the power of the commission to entirely divest itself of jurisdiction and thereby nullify the will of Congress.

We are therefore of opinion that Alaska is a Territory of the United States embraced within the provisions of the act of Congress to regulate commerce and that the Interstate Commerce Commission has jurisdiction of the matters and things presented in relator's complaint. The judgment is reversed with costs, and the cause is remanded with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to take jurisdiction of said cause and proceed therein as by law required.

Reversed.

49 Wednesday, May 24th, A. D. 1911.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY, a corporation, appellant, *vs.* THE INTERSTATE COMMERCE COMMISSION.	No. 2276. April Term, 1911.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said supreme court with directions to issue a peremptory writ of mandamus

directed to the Interstate Commerce Commission, requiring it to take jurisdiction of said cause and proceed therein as by law required.

Per Mr. JUSTICE VAN ORSDEL.

May 24, 1911.

50 In the Court of Appeals for the District of Columbia.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY, a corporation, appellant,
v.
THE INTERSTATE COMMERCE COMMISSION, appellee.
} At Law No. 2276.

PETITION FOR WRIT OF ERROR.

And now comes the Interstate Commerce Commission, the appellee herein, and says that on or about the 24th day of May, 1911, this court entered judgment herein in favor of the appellant and against the appellee, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this appellee, and that the amount involved in said cause, exclusive of interest and costs, exceeds the sum of five thousand dollars, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this appellee prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of; that said writ of error may operate as a writ of supersedeas, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

P. J. FARRELL,
Attorney for the Interstate Commerce Commission, Appellee.

(Endorsed:) No. 2276. The United States of America ex rel. Homboldt Steamship Company, appellant, vs. The Interstate Commerce Commission. Petition for writ of error. Court of Appeals, District of Columbia. Filed Jun -12- 1911. Henry W. Hodges, clerk.

51 In the Court of Appeals of the District of Columbia.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY, a corporation, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION, appellee.
} At Law No. 2276.

ASSIGNMENT OF ERRORS.

And now, on the 12th day of June, 1911, comes the above named appellee, Interstate Commerce Commission, by its attorney, and

says that the judgment in the above-entitled cause is erroneous and against the just rights of said appellee for the following reasons:

First. The court erred in holding that the District of Alaska is a territory within the meaning of section 1 of the act to regulate commerce.

Second. The court erred in holding that the liberal rule of construction applicable to remedial statutes should be applied in determining whether or not a writ of mandamus should be issued in this case against the Interstate Commerce Commission.

Third. The court erred in holding that the act of May 14, 1898, conferring upon the Secretary of the Interior authority to revise and modify rates charged for the transportation of freight and passengers by common carriers operating lines of transportation in the District of Alaska, was repealed by section 10 of the Hepburn Act of June 29, 1906.

Fourth. The court erred in holding that in determining that the District of Alaska is not a territory within the meaning of section 1 of said act, the commission was not required to and did not exercise judgment in accordance with the authority conferred and the duty imposed upon it by said act.

52 Fifth. The court erred in holding that where the commission is required to and does exercise judgment in construing the law under which it operates, such judgment may be reviewed and reversed or corrected in a proceeding in mandamus.

Sixth. The court erred in holding that no question of fact was involved in the judgment of the commission which is the subject matter of this proceeding.

Seventh. The court erred in holding that said appellant, the Humboldt Steamship Company, was without legal remedy other than a proceeding in mandamus.

Eighth. The court erred in reversing the judgment of the Supreme Court for the District of Columbia and remanding the cause with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to assume jurisdiction over common carriers operating lines of transportation within the District of Alaska.

Whereof, said appellee, the Interstate Commerce Commission, prays that said judgment be reversed.

P. J. FARRELL,
Attorney for Interstate Commerce Commission, Appellee.

(Endorsed:) No. 2276. The United States of America ex rel. Humboldt Steamship Company, appellant, vs. The Interstate Commerce Commission. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jun -12- 1911. Henry W. Hodges, clerk.

53 Monday, October 9th, A. D. 1911.

THE UNITED STATES OF AMERICA EX REL. HUMBOLDT Steamship Company, a corporation, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION.
No. 2276.

On motion of Mr. P. J. Farrell, attorney for the appellee, It is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States, issue.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between the United States of America ex rel. Humboldt Steamship Company, a corporation, appellant, and the Interstate Commerce Commission, appellee, a manifest error hath happened, to the great damage of the said appellee, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 9th day of October, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

55 UNITED STATES OF AMERICA, *ss:*

To the United States of America ex rel. Humboldt Steamship Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein the Interstate Commerce Commission is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Seth Shepard, chief justice of the Court of Appeals of the District of Columbia, this 9th day of October, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Oct. 9th, 1911.

CHARLES D. DRAYTON,
Counsel for Humboldt Steamship Co.

(Endorsed:) Court of Appeals, District of Columbia. Filed Oct 9, 1911. Henry W. Hodges, clerk.

56 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 55, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of the United States of America ex rel. Humboldt Steamship Company, a corporation, appellant, vs. The Interstate Commerce Commission, No. 2276, October term, 1911, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals at the city of Washington this 11th day of October, A. D. 1911.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed:) File No. 22935. District of Columbia, Court of Appeals. Term No. 859. The Interstate Commerce Commission plaintiff in error, vs. The United States of America ex. rel Humboldt Steamship Company. Filed November 14th, 1911. File No 22935.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

INTERSTATE COMMERCE COMMISSION, plaintiff in error, *v.* THE UNITED STATES, EX REL. HUMBOLDT STEAMSHIP COMPANY.	No. 859.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

On behalf of the Interstate Commerce Commission, plaintiff in error, the Solicitor General respectfully moves the court to advance the above-entitled cause for hearing during the present term for the following reasons:

1. This is a writ of error by the Interstate Commerce Commission from a final judgment of the Court of Appeals of the District of Columbia in a suit brought by the Humboldt Steamship Company to obtain a writ of mandamus requiring the Interstate Commerce Commission to assume jurisdiction over common carriers operating lines of transportation in the District of Alaska, a juris-

diction which, to the present time, the Commission has declined as not granted by the interstate commerce act.

While the act to regulate commerce, as amended June 29, 1906 (34 Stat. 584, 592), in its provision for the expedition of cases, is limited in terms to suits in equity, still it is believed that the spirit of the law applies to a suit like the present; and the suit is of such general interest and importance that it is believed it should be advanced for hearing.

I am authorized to state that counsel for the defendant in error concur in this motion.

F. W. LEHMANN,
Solicitor General.

FEBRUARY, 1912.

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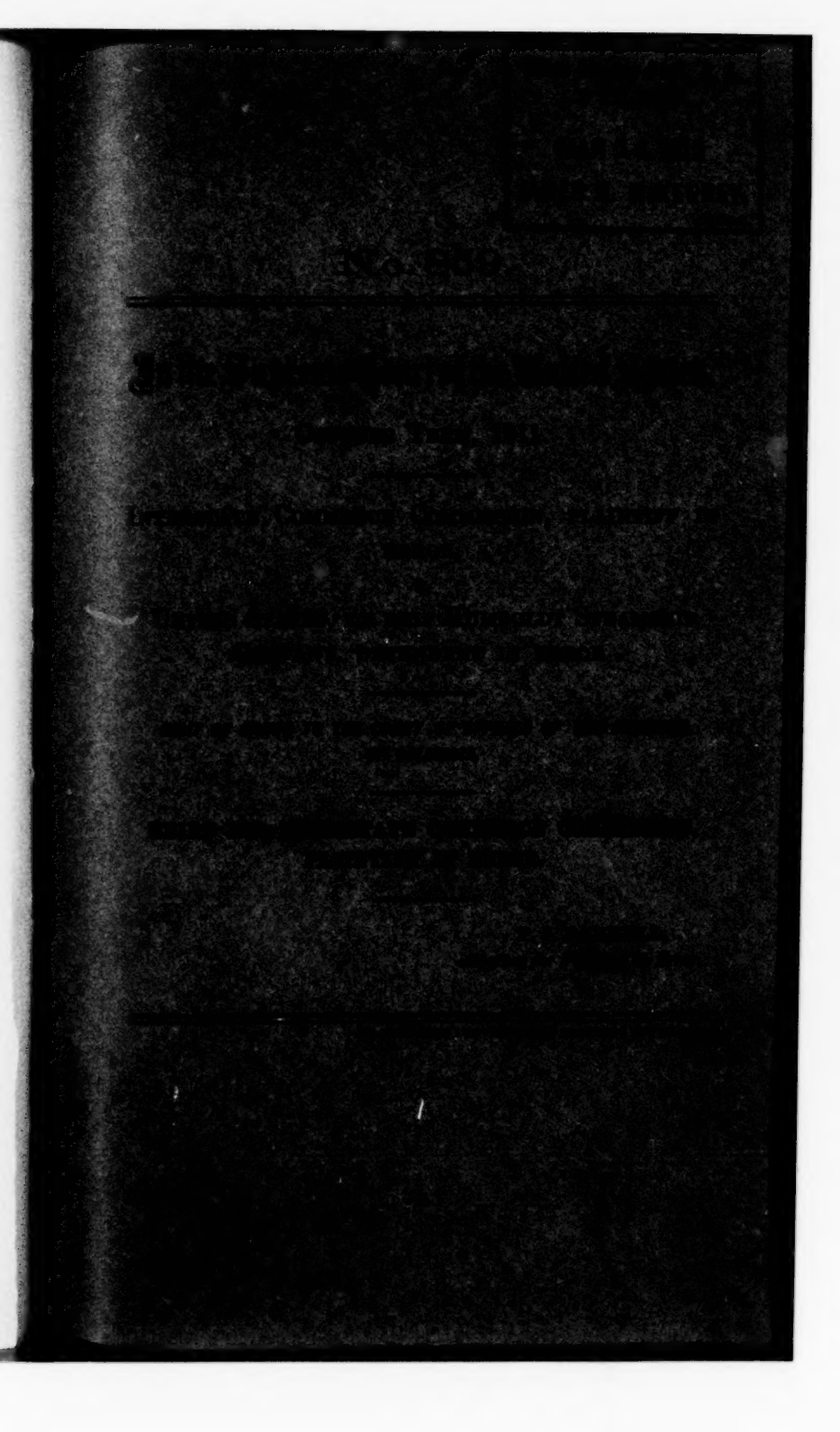

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

INTERSTATE COMMERCE COMMISSION, plaintiff in error,
v.
UNITED STATES, EX REL. HUMBOLDT Steamship Company, defendant in error.
} No. 859.

WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR INTERSTATE COMMERCE COMMISSION, PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Court of Appeals of the District of Columbia to review an order of that court reversing an order of the Supreme Court of the District of Columbia denying the writ of mandamus prayed for in a petition filed in the latter court by the Humboldt Steamship Company against the Interstate Commerce Commission and dismissing said petition. The pertinent circumstances which

preceded the filing of said petition as aforesaid are, in substance, as follows:

On May 26, 1909, the steamship company instituted a proceeding before the commission by filing in the commission's office a complaint against the White Pass & Yukon route, consisting of the Pacific & Arctic Railway & Navigation Co., British Columbia-Yukon Railway Co., British-Yukon Railway Co., and British-Yukon Navigation Co. (Ltd.). In said complaint it was alleged that the defendants were required by law to file with the commission, in the form prescribed by the act to regulate commerce, and print and keep open to public inspection, schedules showing their rates, fares and charges for the transportation of passengers and property between points in Alaska and points in the Dominion of Canada and other places, and among other things the steamship company requested the commission to require said defendants to so file, etc., such schedules. Thereafter said defendants, in accordance with the provisions of said act, and pursuant to the rules of practice adopted and promulgated by the commission, filed answers to said petition. Thereafter, in said proceeding, the Copper River & Northwestern Railway Co. intervened on behalf of said defendants, and Miller-Reed-Pease Co., A. D. Blowers & Co. (Inc.), H. S. Emerson Co., and Sunde & Erland Co. intervened on behalf of the steamship company. The commission duly assigned said proceeding for hearing at Seattle, Wash., on October 7, 1909. At said hearing all the parties to said proceeding were, and each of them

was, afforded a full and complete opportunity to present such testimony as they, or any of them, might desire to have considered and passed upon by the commission, and in said proceeding said parties, by their respective counsel, did then and there introduce much testimony and other evidence and make oral arguments. Thereafter, in said proceeding, the steamship company, said defendants and said interveners, by their respective counsel, filed briefs in the office of the commission. Thereafter, on July 6, 1910, the commission, in accordance with the provisions of said act, made, entered, and filed a report and order in said proceeding, and in and by said order dismissed said complaint. (See 19 I. C. C. Rep. 105.) In said report the commission stated certain facts and at the conclusion of the statement said:

> Beyond the foregoing outline of the situation presented in this case, we deem it unnecessary to state the facts in greater detail, and expressly refrain from passing judgment upon the merits of the controversy, because we are constrained to hold, upon authority of the decision recently announced *In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska* (19 I. C. C. Rep. 81), that the commission is without jurisdiction to make the order sought by complainant.

On July 16, 1910, the steamship company, in accordance with the provisions of section 16a of said act, filed in the office of the commission a petition for a rehearing in said proceeding in the nature of a reargument, alleging as ground for such application

that the commission erred as a matter of law in holding that it is without jurisdiction over carriers operating in Alaska. On July 19, 1910, the commission denied the petition for rehearing, and on July 21, 1910, the steamship company filed its petition as aforesaid in the Supreme Court of the District.

The proceeding *In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska* (see Exhibit B to the petition filed by the steamship company in the court below, Rec., 9), was instituted by the commission upon its own motion for the purpose of ascertaining whether the commission might assume and exercise jurisdiction over carriers operating lines of transportation in the District of Alaska.

After an exhaustive investigation and careful consideration of all the pertinent facts and circumstances, the commission, in accordance with the provisions of section 14 of said act, made a report in writing, which included a statement of the facts upon which its decision was based, and concluded as follows:

> We therefore hold that we have no jurisdiction in the District of Alaska under the act to regulate commerce, as amended, and in reaching this conclusion we are not unmindful of the fact that the Congress may readily confer that power upon us under clear provision of law, if that has been or is now its desire. (Rec., 22.)

In the Supreme Court of the District the opinion was delivered by Mr. Justice Barnard (Rec., 36), who stated that the case was heard on the record

made by the petition, the answer thereto and a joinder of issue; that several allegations contained in the petition were denied in the answer, and that many allegations of new matter were also included in the answer. He also called attention to many other facts and circumstances tending to show that in rendering the decision and making the order, which are the subject matter of complaint, the commission was required to and did exercise judgment in accordance with authority conferred upon it by the act under which it operates. He expressed the opinion that the various acts referred to are sufficiently broad to include Alaska, but admitted that the law relating to the jurisdiction of the commission is not clear and that the matter of jurisdiction is one concerning which different minds may reach different conclusions. At the close of his opinion he said:

> Entertaining these views, if this court were sitting as an appellate court, and had jurisdiction to hear appeals from the Interstate Commerce Commission, I should feel constrained to reverse their decision in the said proceeding No. 2518, and to require them to pass upon the merits of the controversy therein described. Mandamus, however, can not be used as a writ of error, or appeal; and the court has no appellate jurisdiction to review the decisions of the Interstate Commerce Commission.
>
> The question here, as it seems to me, is, whether this court should issue a writ of mandamus to require the Interstate Commerce

Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach?

The writ of mandamus is an extraordinary writ that is to be issued only where the party applying for the same has a clear legal right to the relief he claims, which he can not obtain by any other proceeding. He must not only have a clear legal right, but there must be a clear legal duty on the part of the respondent, which he refuses to perform, and that duty must be ministerial in its character, and in no degree discretionary.

Can it be said that the legal duty is clear when a commission composed of seven gentlemen well versed in the law are divided in opinion as to that duty, four to three? And if the relator's right depends on the construction of the law, about which there is such difference of opinion among judges, can it be said that he has a clear legal right to the relief demanded?

I have no doubt that this court has jurisdiction to grant the writ of mandamus against the Interstate Commerce Commission, provided the case made is sufficiently clear; but there seems to me too much doubt as to the relator's right, and as to the respondent's duty, to warrant the exercise of that jurisdiction by the court in this case.

The relator has no other remedy, and if the case were plain, the court would not hesitate to issue the writ as prayed; but where there

> is any reasonable doubt of the existence of the essential conditions above stated, the court should decline to issue the writ of mandamus. (Rec., 41–42.)

From the judgment of the Supreme Court of the District denying the writ the case was taken by the steamship company to the Court of Appeals of the District, with the result that the order of the former was reversed by the latter, whereupon the case was taken to this court by the commission as aforesaid.

The assignments of error relied upon are:

1. The court erred in holding that the District of Alaska is a Territory within the meaning of section 1 of the act to regulate commerce.

2. The court erred in holding that the liberal rule of construction applicable to remedial statutes should be applied in determining whether or not a writ of mandamus should be issued in this case against the Interstate Commerce Commission.

3. The court erred in holding that the act of May 14, 1898, conferring upon the Secretary of the Interior authority to revise and modify rates charged for the transportation of freight and passengers by common carriers operating lines of transportation in the District of Alaska, was repealed by section 10 of the Hepburn Act of June 29, 1906.

4. The court erred in holding that in determining that the District of Alaska is not a Territory within the meaning of section 1 of said act, the commission was not required to and did not exercise judgment

in accordance with the authority conferred and the duty imposed upon it by said act.

5. The court erred in holding that where the commission is required to and does exercise judgment in construing the law under which it operates, such judgment may be reviewed and reversed or corrected in a proceeding in mandamus.

6. The court erred in holding that no question of fact was involved in the judgment of the commission which is the subject matter of this proceeding.

7. The court erred in holding that said appellant, the Humboldt Steamship Company, was without legal remedy other than a proceeding in mandamus.

8. The court erred in reversing the judgment of the Supreme Court for the District of Columbia and remanding the cause with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to assume jurisdiction over common carriers operating lines of transportation within the District of Alaska.

POINTS.

1.

ALASKA IS NOT A TERRITORY OF THE UNITED STATES WITHIN THE MEANING OF SECTION 1 OF THE ACT TO REGULATE COMMERCE.

The case of *In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska* was instituted by the commission on its own motion for the express purpose of ascertaining whether the commission

would be justified in assuming jurisdiction over common carriers operating lines of transportation in the District of Alaska, and as a result of its investigation in the premises the commission made a report which included, among others, the following facts:

In the jurisdictional clause of the act to regulate commerce, which is section 1 thereof, as amended on June 29, 1906, by what is commonly called the Hepburn law, the District of Alaska is not included by name and the word "District" as used in that section is confined to the District of Columbia.

Alaska has never been officially designated as a Territory, but by the act of May 17, 1884 (Rev. Stat. 1, Sup. Chap. 53, p. 430), by which the first civil government was established for Alaska, it was provided that the territory ceded to the United States by Russia, by treaty proclaimed in this country on June 20, 1867, "shall constitute a civil and judicial district." It was also provided in said act that the temporary seat of government of said "District" should be at Sitka. (Rec., 11.)

Alaska is also described as a District in the act of June 4, 1887, providing for the appointment of commissioners of deeds and a marshal, and in the act of July 24, 1897, providing for the appointment of a surveyor general. (Rec., 12.)

Also in the act of June 6, 1900 (31 Stat. L., 321), making further provision for a civil government for Alaska, it is again provided that the territory so ceded to the United States shall constitute a "civil and judicial district," with a "temporary seat of

government of said District" at Juneau. (Rec., 12.)

In the appropriation acts of 1907 and 1908 (34 Stat. L., 963, and 35 Stat. L., 212), Alaska is called a District, while Arizona, New Mexico, and Hawaii are described as Territories. (Rec., 12.)

In the act of January 27, 1905 (33 Stat. L., 616), providing for the construction and maintenance of roads, schools, and an insane asylum, and in the amendment thereto of March 3, 1905 (33 Stat. L., 1262), and also in another act of the same date (33 Stat. L., 1265), prescribing the duties of its secretary, Alaska is described as a District. (Rec., 12–13.)

In the act of May 14, 1898 (30 Stat. L., 409), the power to regulate the rates of railroads in Alaska was conferred upon the Secretary of the Interior. The pertinent language of that act is as follows:

> That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section 6 of an act to regulate commerce, as amended on March 2, 1889, and such rates shall be subject to revision and modification by the Secretary of the Interior. (Rec., 21.)

In section 1 of the act to regulate commerce approved February 4, 1887, it is provided:

> That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a

> common control, management, or arrangement for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, * * *.

No change was made in the language above referred to until June 29, 1906, when the words "from one place in a Territory to another place in the same Territory" were added; and since the amendment of June 18, 1910, the pertinent portion of said section 1 has read and now reads:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the

> District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory.

And in section 10 of the Hepburn law it was provided:

> That all laws and parts of laws in conflict with the provisions of this act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

At the time the amendment of June 29, 1906, was made the Congress was acquainted with the rulings of the commission, that the District of Alaska is not a Territory of the United States within the meaning of section 1 of the act to regulate commerce, and that the commission has no authority or jurisdiction over carriers engaged in the transportation of passengers or property within the District of Alaska, and its action in extending the jurisdiction of the commission to districts of the United States other than the District of Columbia in connection with the business of telegraph, telephone, and cable companies, and also in connection with the transportation of oil and other commodities, except water and natural or artificial gas by pipe lines, and partly by pipe lines and partly by railroad, and partly by pipe lines and partly by water, but refusing to so extend the jurisdiction of the commission so far as other transportation is con-

cerned, must be taken to be an approval of the commission's interpretation of said act.

In this connection we call attention to what is known as the Townsend bill (H. R. 17536), reported to the whole House by the Committee on Interstate and Foreign Commerce in the second session of the Sixty-first Congress on April 1, 1910, entitled "A bill to create an Interstate Commerce Court and to amend the act entitled 'An act to regulate commerce,' approved February 4, 1887, as heretofore amended and for other purposes." The pertinent language of said Townsend bill was as follows:

> SEC. 6a. That section one of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby now amended so as to read as follows:
>
> SECTION 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, or to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State, Territory, or dis-

> trict of the United States, to any other State, Territory, or district of the United States, or from one place in a Territory or district to another place in the same Territory or district, * * *.

Also, on January 9, 1911, after the Supreme Court of the District had rendered its decision denying the writ of mandamus asked for in this case, what is known as the Fletcher bill (S. 9975), entitled "A bill to extend the laws to regulate commerce and the authority and jurisdiction of the Interstate Commerce Commission to and over Alaska," was introduced in the Senate of the United States at the third session of the Sixty-first Congress. The language of the bill was:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act entitled, "An act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, and June eighteenth, nineteen hundred and ten," be, and the same is hereby, extended to what is called the District of Alaska and sometimes designated the Territory of Alaska, meaning that portion of the territory of the United States ceded by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and in said act and all amendments and supplemental acts thereto, the word "Territory," meaning a circumscribed portion of the territory of the

United States, accorded a form of territorial government, and thus organized and established as a Territory, shall extend to and embrace and include the said District of Alaska, meaning all that portion of the territory of the United States ceded to the United States by treaty with His Majesty the Emperor of all the Russias, dated March thirtieth, eighteen hundred and sixty-seven, and proclaimed in this country on June twentieth, eighteen hundred and sixty-seven, and the authority and jurisdiction of the Interstate Commerce Commission provided in said acts, and all amendments and supplements thereto, shall extend over carriers engaged in the transportation of passengers or property within, to, or from the said District or Territory of Alaska in the same way and as fully and completely, as if the said District of Alaska was a regularly organized and established and declared Territory, and precisely as if when said acts were passed the said District of Alaska was meant to be included in the word Territory, appearing in said acts, the same as the Territory of Alaska or any other Territory, and said Alaska shall be considered and held a Territory in so far as the said laws to regulate commerce and the jurisdiction and authority of the Interstate Commerce Commission are concerned, and within the meaning of said acts and amendments.

SEC. 2. That all that portion of section two of the act of May fourteenth, eighteen hundred and ninety-eight, providing as follows: "That all charges for transportation of freight and

> passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an act to regulate commerce, as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior," be, and the same is hereby, repealed.

However, both attempts to place common carriers operating lines of transportation in Alaska under the control of the commission, failed.

It is not claimed that it would have been proper for the commission to exercise, previous to June 29, 1906, over transportation between the State of Washington and the District of Alaska the jurisdiction that it is said the court should now, by the use of the writ of mandamus, compel it to assume, nor is any attempt made to show a single instance where the commission has ever exercised such jurisdiction. Nevertheless, it will be observed that the word "Territory" has been included in said section 1 ever since the commission was organized in 1887; and if that word as employed in the amendment of said June 29, requires the commission to assume jurisdiction over transportation from one point to another in the District of Alaska, it necessarily follows that the same word as formerly used in that section required the commission to exercise jurisdiction previous to said June 29 over transportation from the State of Washington to the District of Alaska and in the opposite direction. Therefore, the fact that it never did so, and the further fact that the commission's conclusion in this regard

concerning its jurisdiction was acquiesced in for more than nineteen years by Congress and the public generally, are, we submit, matters of great importance in connection with the issues involved in this case. Counsel for the defendant in error do not claim that anything happened on June 29, 1906, or has occurred since, which added to the force of the word "Territory," and we feel certain that the word was as forceful and comprehensive previous to that date as it has been since or is now.

Under these circumstances, this court will consider itself bound by the interpretation of the commission, which is the tribunal primarily charged with the enforcement of the provisions of said act.

In *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission* (200 U. S. 361) it was contended that an interpretation placed upon said act by the commission in the cases of *Haddock* v. *Delaware, L. & W. R. Co.* (4 I. C. C. Rep. 296) and *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.* (4 I. C. C. Rep. 535) was binding upon the court, and in answer to this contention this court, speaking through the present Chief Justice, said:

> Now, without at all intimating that as an original question we would concur in the view expressed in the case last cited that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting as presented in the Haddock and Coxe cases, would have been confiscatory, and

> without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. (Ib. 401–402.)

It is contended that the authority conferred upon the Secretary of the Interior by said act of May 14, 1898, has been taken away by section 10 of the Hepburn law above mentioned, but, aside from the fact that the law does not favor repeals by implication, it will be observed that Alaska is not referred to by name either in the Hepburn law or in the act to regulate commerce, and it is also true that the Congress has never specifically conferred upon the commission jurisdiction over any common carrier in any district of the United States except the District of Columbia.

Also it is clear that at the time the act to regulate commerce was passed the Congress did not intend to confer upon the commission the jurisdiction here in question, because at that time there were no railroads in Alaska, and it will be observed that the same act, namely, the act of May 14, 1898, which authorized the construction of railroads in that district also authorized the Secretary of the Interior to regulate rates for the transportation of passengers and property over such railroads.

On account of the matters above set forth, and for other reasons stated in the reports of the commission above referred to, we insist that the commission's conclusion that it is without jurisdiction over common carriers operating lines of railway in the District of Alaska is correct and should be sustained.

II.

MANDAMUS IS NOT A PROPER PROCEEDING IN WHICH TO CORRECT AN ERROR OF LAW LIKE THAT ALLEGED IN THE PETITION.

Assuming, *arguendo*, that the commission committed an error of law in deciding that it was without jurisdiction over common carriers operating lines of railway in the District of Alaska, the error is one which can not be corrected in a proceeding in mandamus, under the circumstances disclosed by the record, because mandamus can not be used to perform the office of a writ of error.

In *Commissioner of Patents* v. *Whiteley* (4 Wall., 522), which was a proceeding to obtain a writ of mandamus requiring the Commissioner of Patents to

examine an application for the reissue of a certain patent, the Supreme Court of the United States, speaking through Mr. Justice Swayne, said:

> The principles of law relating to the remedy by mandamus are well settled.
>
> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.
>
> It is applicable only in these two classes of cases. It can not be made to perform the functions of a writ of error. (Ib., 533–534.)

To the same effect see:

West v. *Hitchcock*, 19 App. D. C., 333, 342.

Decatur v. *Paulding*, 14 Pet., 497, 514, 516; 10 L. Ed., 559.

U. S. v. *Black*, 128 U. S., 40, 48; 9 Sup. Ct., 12; 32 L. Ed., 354.

U. S. v. *Guthrie*, 17 How., 284; 15 L. Ed., 102.

Georgia v. *Stanton*, 6 Wall., 50; 18 L. Ed., 721.

Gaines v. *Thompson*, 7 Wall., 347; 19 L. Ed., 62.

U. S. v. *Windom*, 137 U. S., 636, 644; 11 Sup. Ct., 197; 34 L. Ed., 811.

U. S. v. *Blaine*, 139 U. S., 306, 319; 11 Sup. Ct., 607; 35 L. Ed., 183.

U. S. v. *Lamont*, 155 U. S., 303, 308; 15 Sup. Ct., 97; 39 L. Ed., 160.

Kimberlin v. *Commission to Five Civilized Tribes et al.*, 104 Fed., 653, 655, 658.

In *Kimberlin* v. *Commission to Five Civilized Tribes et al., supra*, the court in speaking of the issue of the writ of mandamus said:

> It may not lawfully issue to command or control an executive officer in the discharge of those of his duties which involve the exercise of his judgment or discretion either in the construction of the law or in determining the existence or effect of the laws. It may not lawfully issue to review, revise, or correct the erroneous decision of an executive officer in such cases, even though there may be no other method of review or correction provided by law. (Ib. 658.)

In *Decatur* v. *Paulding, supra*, it was shown that Mrs. Decatur came within the terms of a general law giving a certain kind of pension to the widow of an officer who had died in the naval service, and that Congress had also passed a resolution granting to her a pension of a different kind, but the Secretary of the Navy decided that she was not entitled to both pensions; and it was held that in thus interpreting the law the Secretary was required to and did exercise judgment and discretion in accordance with authority duly conferred upon him, and that, therefore, his decision was not open to review in a proceeding in mandamus. In explanation of its ruling in this regard this court said:

> If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a

> department. And if they supposed his decicision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by *mandamus* act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. (Ib. 515.)

In *United States* v. *Black*, *supra*, it was held that mandamus would not lie to review a decision of the Commissioner of Pensions interpreting an act of Congress providing, in certain cases, for the payment of pensions. It was contended that the facts found by the commissioner and reported to the court showed that the commissioner had wrongly interpreted the law, but the court held that mandamus was not a proper proceeding in which to correct an error of that nature. (Ib. 43–50.)

In *United States* v. *Guthrie*, *supra*, a writ of mandamus was sought to compel the Secretary of the Treasury to pay to Aaron Goodrich a certain sum of money for salary alleged to be due him as chief justice of the Territory of Minnesota for a period after his

removal from office by the President. On March 19, 1849, Mr. Goodrich was duly appointed such chief justice for a period of four years, but on October 22, 1851, he was removed from the office by the President, who, with the advice and consent of the Senate, appointed in his stead Jerome Fuller. Under these circumstances, the Secretary of the Treasury decided that Mr. Goodrich was not such chief justice after said October 22, and thereupon refused to make the payment requested. It was contended that the removal was illegal and could not be used as an excuse for refusing to perform a purely ministerial act, namely, the payment of the salary, but it was held that the decision of the Secretary could not be reviewed in a proceeding in mandamus. In this connection, the court said:

> In their discussion of this cause, the counsel on either side have deemed themselves called upon to take a more extensive range of inquiry, than is that by which we consider this controversy to be properly limited. They have supposed that, in the regular line of this controversy, and, therefore, in its correct adjudication, were involved, necessarily, the tenure and character of the judicial power, as created either by the Constitution or by the legislation of Congress; as likewise the powers of the executive department, in the exercise of its constitutional functions, to control or influence the judicial power; and in their examination, by the counsel, of these deeply important topics, much of research and ingenuity has been evinced. But, within what we

> conceive to be the correct apprehension of this cause, neither of those important topics is embraced; * * *.

And in *Commissioner* v. *Whiteley*, *supra*, it was held that mandamus would not lie to review the decision of the Commissioner of Patents in interpreting the act of July 4, 1836, providing, in certain cases, for the issuance of new patents to assignees, and a contrary decision of the Supreme Court for the District of Columbia was overruled. In ruling that mandamus was not a proper remedy to apply, the court, speaking through Mr. Justice Swayne, said:

> It was clearly competent for the commissioner, and it was his duty, to decide whether the applicant was an assignee at all; and, if so, whether he was an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision upon the subject. The latter question is an important one. It is as yet unsettled, and awaits an authoritative determination.
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> * * * * *
>
> The commissioner found the question, whether the assignee was such a one as the law entitled to a reissue, lying at the threshold of his duties. It required an answer before he could proceed further. His decision was against the appellant. His examination of the subject was thorough, and his conclusion is supported by an able and elaborate argument. It was made a part of his reply to the rule, and is found in the record.

From this decision, whether right or wrong, the relator had a right, under the statute, to appeal.

If the *mandamus* had ordered the commissioner to allow the appeal, we should have held the order under which it was issued to be correct. But the order was that he should proceed to examine the application. That he had already done. The preliminary question which he decided was as much within the scope of his authority as any other which could arise. Having resolved it in the negative, there was no necessity for him to look further into the case. Entertaining such views, it would have been idle to do so. The question was vital to the application, and its resolution was fatal, so far as he was concerned. Only a reversal by the tribunal of appeal could revive it, and cast upon him the duty of further examination.

The principles of law relating to the remedy by mandamus are well settled.

It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.

It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.

It is applicable only in these two classes of cases. It can not be made to perform the functions of a writ of error. (Ib. 532–534.)

Many other cases of a similar nature might be referred to, but further citation of authorities does not appear to us to be necessary. We think the cases above mentioned fully support our contention that the subject matter of complaint in this case is covered by the rule which prohibits the issue of a writ of mandamus to reverse or correct a decision involving the exercise of judgment or discretion.

The steamship company says it is the duty of the commission to execute and enforce the provisions of the act to regulate commerce, but it is evident that before making any order in that connection the commission must ascertain whether or not the act has been violated; that is to say, it must assume and exercise jurisdiction to the extent of developing the pertinent facts and then in the exercise of its judgment decide whether or not the facts show that a violation has taken place, and that is exactly what it did in the proceeding instituted before it as aforesaid. It will be seen that at the time the commission rendered its decision in the premises and made the order complained of, it might have rendered a contrary decision and made an order of a very different nature. At that time the commision had taken all the steps necessary to enable it to pass upon and decide every question of law and of fact pertaining to said proceeding, and if, instead of deciding as it did, it had decided that the contentions of the steamship company were correct, it might have made an order against the carriers complained of requiring them to cease and desist from doing in the future

certain things they had done in the past, or to do in the future certain things they had neglected to do in the past, or both. If the decision, instead of being against the steamship company, had been against the carriers, could it have been reviewed, reversed, or corrected in a proceeding in mandamus? Certainly not; because a decision of that kind can be reviewed only in a court of equity, and under these circumstances we fail to see why the commission rendered itself more liable to a proceeding in mandamus by deciding against the steamship company than it would have been had it decided against the carriers. In either case, the exercise of judgment would have been necessary, but no more necessary in the one case than in the other. What the commission did, not what it neglected or refused to do; in other words, the action taken by the commission in making its report and order as aforesaid, not the neglect or refusal of the commission to act, not the failure of the commission to assume and exercise jurisdiction in the premises, is the subject matter of complaint.

We believe the issue in this case is fully and completely covered by the decision of this court in *Commissioner* v. *Whiteley, supra*. In that case Whiteley requested the Commissioner of Patents to reissue to him as assignee a certain patent. If he was an assignee within the meaning of the act of July 4, 1836, he was entitled to the reissue, but the commissioner decided he was not, and thereupon refused to grant his request. The Supreme Court of the District, evi-

dently thinking the commissioner had wrongly interpreted the law, so far as his jurisdiction was concerned, issued a writ of mandamus commanding him to take further action in the premises, but that ruling was reversed by this court, which in this connection said: "The commissioner found the question, whether the assignee was such a one as the law entitled to a reissue, lying at the threshold of his duties. It required an answer before he could proceed further. His decision was against the appellant. His examination of the subject was thorough, * * *. The preliminary question which he decided was as much within the scope of his authority as any other which could arise. Having resolved it in the negative, there was no necessity for him to look further into the case. Entertaining such views, it would have been idle to do so. The question was vital to the application, and its resolution was fatal, so far as he was concerned. Only a reversal by the tribunal of appeal could revive it, and cast upon him the duty of further examination."

It will be observed that this court did not say the decision of the Commissioner of Patents was correct. What it did say in this connection was that the "question is an important one. It is as yet unsettled, and awaits an authoritative determination." In other words, this court, without passing upon the correctness of the decision of the commissioner, interpreting the law concerning his jurisdiction, denied the right of the Supreme Court of the District to review, reverse or correct that decision in a proceeding in mandamus.

In this case the steamship company requested the commission to make an order requiring certain carriers to cease and desist from doing in the future certain things they had neglected or refused to do in the past. The commission found the question, whether the carriers complained of were common carriers within the meaning of section 1 of the act to regulate commerce, lying at the threshold of its duties. That question required an answer before the commission could proceed further. The decision of the commission was against the steamship company. Its examination of the subject was thorough. The preliminary question which it decided was as much within the scope of its authority as any other which could arise. Having resolved it in the negative, there was no occasion for the commission to look further into the case. Entertaining such views, it would have been idle to do so. The question was vital to the application of the steamship company, and its resolution was fatal, so far as the steamship company was concerned. Only a reversal by the tribunal of appeal can revive it, and cast upon the commission the duty of further action in the premises.

It is contended that this proceeding in mandamus is the only remedy open to the defendant in error; that is to say, that where as in this case the commission, after hearing and investigation in a proceeding instituted before it, dismisses the complaint of the complainant, the question of whether in doing so it

commits an error of law can not be determined at all unless it may be passed upon in a proceeding in mandamus. This, however, is in absolute conflict with a ruling of the United States Commerce Court in the case of *The Proctor & Gamble Company* v. *The United States et al.* (188 Fed. 221).

We attach hereto, marked Exhibit A, a brief filed in this case on behalf of certain interveners in the Supreme Court of the District by Mr. F. C. Elliott, as *amicus curiæ,* and respectfully request the court to treat same as a part of this brief.

On the record, and because of the reasons given in the aforesaid reports of the commission and in the briefs referred to, we respectfully submit that the judgment of the Court of Appeals of the District, reversing the judgment of the Supreme Court of the District, is erroneous and should be reversed.

Respectfully submitted.

P. J. FARRELL,

Attorney for Interstate Commerce Commission,

Plaintiff in Error.

EXHIBIT A.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, AT LAW NO. ——.

THE UNITED STATES OF AMERICA, EX REL. THE HUMBOLT STEAMSHIP COMPANY, PETITIONER, *v.* THE INTERSTATE COMMERCE COMMISSION, RESPONDENT.

ARGUMENT.

As the Pacific & Arctic Railway & Navigation Co. is operating a line of railway in Alaska, extending from Skagway, Alaska, to the summit of White Pass, the international boundary line between the United States and Canada, and will, therefore, be vitally affected by the decision rendered in this case, we have been constrained to apply for leave as *amicus curiæ* to file with the court for consideration an argument upon the questions involved.

We have taken this action for the reason that our rate schedules have already been filed with the Secretary of Interior, as required by the act of Congress of May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," and to be required to file our schedules with the Commerce Commission, and comply with the many rules and regulations of the commission, will entail upon this small railway an amount of unnecessary work and detail which would be burdensome in the extreme.

The question of its jurisdiction has been argued fully before the commission and carefully considered

by that tribunal, resulting in its decision that it is without jurisdiction over Alaskan railways. We submit the decision of the commission was rightful, and the only decision it could logically render for the following reasons:

1. Alaska is not within the purview of the commerce act.

2. Congress has expressly conferred jurisdiction over Alaskan railways upon the Secretary of the Interior by act of Congress of May 14, 1898.

3. The act of Congress of May 14, 1898, conferring jurisdiction over Alaskan railways upon the Secretary of the Interior is still in force and effect.

I. ALASKA IS NOT WITHIN THE PURVIEW OF THE COMMERCE ACT.

Whether or not the Commerce Commission has jurisdiction over Alaskan railways must depend upon whether or not Alaska falls within the terms used by Congress in section 1 of the commerce act, defining the carriers to which that act applies. The language of that section, prior to its amendment in 1906, so far as it relates to the question under discussion, is as follows:

> That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States,

or the District of Columbia, or from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place through a port of entry in the United States, or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Section 1, as amended by the act of 1906, is changed so as to include within its purview railroads wholly within Territories. Before that amendment a railroad, operating wholly within a Territory, was outside the jurisdiction of the commission. It is to be noted further that Congress, in amending the commerce act at its last session, provided that the act should apply to corporations or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one *State, Territory or district of the United States* to

any other State, Territory or district of the United States, etc., but, so far as carriers by railroad are concerned, leaves them exactly where they were prior to the adoption of the last amendment to section 1, that is, transportation between *States, Territories* or the *District of Columbia*.

Now, to give the commission jurisdiction, the transportation must be from one State or Territory of the United States or the District of Columbia to another State or Territory of the United States or the District of Columbia; or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, or the transportation of property shipped from a place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to a place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

This makes it necessary to determine whether Alaska is, within the meaning of this section and the intention of Congress, a State, a Territory of the United States, or the District of Columbia. It will, of course, be admitted that it is neither a State nor the District of Columbia, and if it comes within the purview of the commerce act it must then be a Territory within the meaning of the act and the intention of Congress.

We do not think that the decisions of the court as to whether or not Alaska is territory of the United States or one of the Territories of the United States for other purposes, casts much light upon the question now to be determined. Whether or not Congress had Alaska in view when this act was passed

and intended to give the Commerce Commission jurisdiction over railways in Alaska, including it under the term "territory," must be drawn from a consideration of the act itself and of the legislation respecting Alaska. At the outset it is to be borne in mind that not for ten years after the commerce act was originally passed was there any authority for the construction of railways in Alaska; no person or corporation had any right to enter Alaska and construct and operate a railway until that right was given by the act of Congress of May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes." It must, therefore, follow that for the time being at least, there could be no railroads in Alaska to which the jurisdiction could apply.

Congress, in the use of the expression "one State or Territory of the United States or the District of Columbia," used these terms advisedly and did not use the term "territory" in the sense of a landed possession, because they used the expression "one State or Territory," thus signifying that the term is used in the sense of a governmental subdivision known by the name of a Territory. This would seem clear for the further reason that while the ground within the boundaries of what is known as the District of Columbia is territory of the United States, Congress expressly designates it by the term District of Columbia, the name given by Congress to the territory covered by it in the sense of a landed possession. The reason for this is perfectly apparent when we consider the legislation with respect to Alaska. It seems to us that it is necessary to keep sharply defined the distinction between the expres-

sion "territory of the United States" in the landed sense, and the expression "a Territory, or one Territory, or any Territory," the latter being cases where the expression is used to designate certain specified governmental subdivisions, which have been given that name by Congress.

When the United States acquired Alaska by purchase from Russia, it acquired sovereign power over that territorial possession except as restricted by the treaty provisions, and it was not incumbent upon the United States to establish a territorial form of government, but Congress had the power to provide for the government of the Territory in such manner as it deemed best. Now, what kind of a government did Congress provide for its territorial possession thus acquired? The possession of Alaska was acquired from Russia by treaty in 1867 and a *quasi* form of civil government was established by act of Congress of July 27, 1868, and on May 17, 1884, Congress passed an act providing a civil and judicial government for Alaska. By that act Congress provided that the territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, should constitute a **civil and judicial district** the government of which should be organized and administered as thereinafter provided. We have the action of Congress in organizing its landed possession known as Alaska, and it would seem that we must give credit to Congress for knowing what it wanted to do and how it wanted to denominate that government. Congress did not say that it should constitute a Territory, but, on the contrary, said that it should constitute **a civil and judicial district,** so that the term applied by Congress and by which it has ever since been known is **" the District of Alaska,"** not

a judicial district simply, but a civil and judicial district. Other portions of our territorial possessions aside from the District of Columbia, were denominated and became known as Territories, and it is in that sense and with reference to such possessions that the term Territory is used in section 1 of the commerce act, because the mere fact of the specification of the District of Columbia shows that Congress intended to differentiate between the words "territories" or "territory" and such portions of our possessions within the United States as were designated by some other name. Nor does Congress simply say that it shall constitute **a civil and judicial district** in the first section, but everywhere in the act it denominates it as a **"district"** and that the temporary seat of government for the **district** be established at Sitka. Now, as to the appointment of the officials, section 2 provides that there shall be appointed, not for the "Territory of Alaska," but for the **"District of Alaska,"** a governor who shall reside therein during the term of his office and be charged with the interests of the United States Government that may arise within said **district.** His specific duties are enumerated and the act goes on to provide that "he shall perform generally in and over said **district** such acts as pertain to the office of governor of a territory so far as the same may be made or become applicable thereto": That Congress intended to and did differentiate between a territory, such as is named in section 1 of the commerce act, and the government provided for Alaska, would seem to be beyond question, because, added to the specific duties required of the governor, the act says, as above mentioned, that he shall perform such acts as pertain to the office of governor of a Territory. If Alaska

was a Territory why give these added powers? It was because Congress did not create the Territory of Alaska and unless it expressly conferred upon the governor of the **District of Alaska** these duties or powers pertaining to the office of a governor of a Territory, the governor of Alaska would be without such duties and powers.

The provisions of the act relating to the courts established a district court for said **district** with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction not inconsistent with the act, as may be established by law. It provides for the appointment of a district judge for such **district** who shall reside in the **district** and who shall hold terms of court at such times and places in the **district** as he may deem expedient. A clerk is to be appointed by the court who is to be ex officio secretary and treasurer of the **district.** He is also to be ex officio recorder of deeds, mortgages, etc., relating to real estate, and register of wills for said **district.**

It is also provided that the President shall appoint four commissioners for said **district,** who shall have the jurisdiction and powers of commissioners of the United States circuit courts in any part of said **district.** They are also to exercise all the duties and powers, civil and criminal, conferred on justices of the peace under the general laws of the State of Oregon so far as the same may be applicable in said **district.** They are also given probate jurisdiction.

The act further provides for the appointment of a marshal for said **district,** who "shall have the general authority and powers of the United States marshals

of the *States* and *Territories.*" The general laws of the State of Oregon are declared to be the law in said **district** so far as the same may be applicable and not in conflict with the provisions of the act or of the laws of the United States.

The **District** of Alaska is created a land district and the United States Land Office for the **district** is located at Sitka.

The United States mining laws are to be in full force and effect in the **district** and persons in possession of lands actually in their use or occupation claimed by them are protected, but the terms under which such persons may obtain title is reserved for future legislation by Congress, and it is expressly provided that nothing in the act shall be construed to put in force in said **district** the general land laws of the United States. It is expressly provided that there shall be no legislative assembly in said **district** nor shall any delegate be sent to Congress therefrom.

It will be seen that Congress, in passing this act, specifically and distinctly differentiates the government of Alaska from that of the Territories. It not only refrains from calling Alaska a Territory, but distinctly gives it the name of **district,** and one might as well say that a person who is given the name of "John" should be classed with those given the name of "James." It is perfectly clear, it seems to us, that Congress not only gave Alaska the name of **district,** but everywhere in the act differentiates between those parts of our domain which it has denominated "Territories" and Alaska, which was denominated **a district.** To repeat, Congress, in prescribing the duties and powers of the governor, says "and he shall perform generally in and over said **district** such acts as pertain to the office of

governor of a Territory so far as the same may be made or become applicable thereto"; and in providing for a marshal for said **district** says that "the marshal for said **district** shall have the general authority and powers of the United States marshals of the States and Territories." If Alaska was or became a Territory of the United States by virtue of this act, why should Congress devolve upon these officials the general powers of like officials in Territories? Congress evidently did not consider that they would have such powers unless actually given them, and we are driven irresistibly to the conclusion that Congress intended that Alaska should not be classed as a Territory, but that it should be what it named it—a district simply. Not only by reason of its christening, but from the fact that these officers were given the general authority like officers would have in Territories, we are driven to this conclusion, because if Alaska was a Territory, then the general laws relating to Territories would be applicable to it and the specific grant of general authority exercised by like officers in Territories would be entirely gratuitous and unnecessary, and we are bound to believe that Congress had a good reason for making the distinction. Furthermore, a great seal was adopted for the use of the courts established and for other official purposes, and that great seal is not the seal of the Territory of Alaska, but the "seal of the **District** of Alaska." Furthermore, from that time to this Congress has never taken any action to change the form and nomenclature of the government then established for Alaska. Not only that, but after the discovery of gold in Alaska and the boom of 1898, recognizing that there was need of a more complete set of laws, Congress adopted the code

entitled "An act making further provision for civil government for Alaska, and for other purposes," approved June 6, 1900. If it had been the intention of Congress that Alaska, with its increased number of inhabitants and increased importance was to be made a Territory instead of a **district** one would have thought that Congress should then have made the change. It did not see fit to do so, and by section 1 of the act of June 6, 1900, it has again provided that "the territory ceded to the United States by Russia by treaty of March 30, 1867, and known as Alaska **shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided."** And then goes on to provide for the appointment of a governor and other officials for the **district.** And again, as to the governor, says, "and he shall perform generally in and over said **district** such acts as pertain to the office of a governor of a Territory."

As regards the marshal for the **district** it is provided that "each marshal shall have the general authority and powers and be subject to the obligations of the United States marshals in the States and Territories." This is not an adoption of the language of the act of May 17, 1884, in respect to the marshal, and by reason of the variation it gives added weight to our contention that Congress considered Alaska as entirely separate and distinct from the class of governmental subdivisions known as Territories. Furthermore, all through the legislation relating to Alaska, Congress has been consistent in differentiating between Alaska and the Territories. As late as the last session of Congress but one that body again evidenced its intention that Alaska is and should be considered a thing apart from the Terri-

tories, and that the use of the term "Territories" or "a Territory" would not include Alaska. This is clearly shown by the corporation-tax amendment to the tariff bill. This amendment, as is well known, was made at the suggestion of the administration and was prepared by the President's advisers. If Alaska is a Territory, as claimed by counsel for the petitioner, it certainly would have been sufficient to have provided for the tax on corporations engaged in business in any State or Territory of the United States or the District of Columbia. But, evidently being of the opinion that Alaska is not a Territory, the application of the act to corporations is made to cover those doing business within "the United States or its Territories, or in Alaska, or in the District of Columbia," and this distinction between the Territories and Alaska is made no less than nine times in the course of the amendment.

Even at its last session Congress again made plain the distinction between Territories and districts by changing, so far as telegraph, telephone, and cable companies are concerned, the language to States, Territories, or districts of the United States, and as to carriers by rail, leaves the language originally employed, States, Territories, or the District of Columbia.

We do not see how Congress, from its first legislation respecting Alaska to the present time, could evince more clearly and distinctly its intention that Alaska should not be considered a Territory, but that it should be considered what it called it, a **district** merely, and hence Alaskan railways would not come within the provision of section 1 of the interstate-commerce act, under the general expression, "a Territory."

The use of the name "district" was not new to our lawmakers, they having adopted that term as applying to the territory set apart for the Capital City and known as the "District of Columbia," and when it came to the acquirement of Alaska and the providing of a government they made use of the same term and called it the "District of Alaska." And if, when the commerce act was adopted, it had been the intention that the Interstate Commerce Commissioners should have jurisdiction over any railways to be constructed in Alaska, certainly Congress would have made use of the expression "District of Alaska" the same as of the "District of Columbia."

The act providing a government for Alaska did more than create a judicial system and Alaska a judicial district, as may be contended, for it not only provided for the organization of courts for the **district,** but it created an executive department at the head of which, as its chief executive, was the governor. Not only that, but it provided for a surveyor general; for the application of the mining laws; and that the general laws of the State of Oregon should be the law in the **district** as far as it was applicable. It also prescribed the right to possession of land by Indians and other persons in the **district** which were occupied by them.

It may be contended that under section 1891 of the Revised Statutes the provision reading "the Constitution and laws of the United States which are locally applicable shall have the same force and effect within all the organized Territories and in every Territory organized as elsewhere in the United States," and that, therefore, the commerce act is applicable, but if we are right in our conclusion that Congress clearly intended to exclude Alaska from the operation of

the commerce act, such contention falls to the ground because that section of the Revised Statutes would not take effect where Congress has signified its intention otherwise, and we hope we have made clear to the court the position which seems so clear to us, that Congress did what it intended to do and that is, excluded Alaska from the purview of the commerce act. This is made even more clear by the fact that Congress, by the act of May 14, 1898, conferred jurisdiction over Alaskan railway rates upon the Secretary of the Interior, and also by that act provided that section 6 of the commerce act should apply, thus excluding all the other sections of that act. This point is mentioned now but incidentally, and will be discussed more at length under Point II.

In the argument before the Commerce Commission, counsel cited several decisions which he claimed established the contention that Alaska is a Territory, but we submit that these decisions can have no binding effect upon the question now under consideration. The courts have never before had this question under consideration for decision, and, as we can not compare things unlike, we can not take a decision based upon a totally different set of facts and treat it as a binding decision or even as a guide in the consideration of the question now under consideration, which arises out of an entirely different set of facts and circumstances. It may well be that Alaska is territory of the United States for some purposes and that the courts consider it in that light, but it does not follow that it is a Territory within the meaning of the commerce act. Especially is this true when Congress has made it so clear that the government organized for Alaska was to be denominated a **district** and not a Territory.

In the case of *Coquitlam* v. *United States* (163 U. S. 346) the question was whether an appeal would lie from a decree of the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit. The act of March 3, 1891, conferring jurisdiction upon the Circuit Court of Appeals, provided that for that purpose the several Territories "shall, by orders of the Supreme Court, to be made from time to time, be assigned to different circuits," and the Supreme Court of the United States, by an order promulgated May 11, 1891, assigned Alaska to the ninth judicial circuit. The only question before the court in that case was whether the Circuit Court of Appeals had jurisdiction and whether the District Court of Alaska would come within the fifteenth section of the act of March 3, 1891, granting jurisdiction to the Circuit Court of Appeals, which provided that that court should have the power to review the judgments, orders and decrees of the supreme courts of the several Territories as they may have to "review the judgments, orders and decrees of the district courts and circuit courts," and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to different circuits, and the court held that Alaska was one of the Territories of the United States within the meaning of *that act*. That decision is not to be taken as judicially determining that Alaska is a Territory of the United States and to make applicable thereto all laws passed by Congress which are supposed to apply to Territories. This is especially true if, as we contend, Congress, by its legislation, has clearly shown that it did not intend that the commerce act should apply to Alaskan railways. We submit that the Coquitlam case is not binding and that there is

no reasoning in the opinion of the court which would make it apply to the question before this commission.

Great stress has been laid upon *Binns* v. *United States* (194 U. S. 486).

In that case appellant had been convicted of doing certain business in Alaska without having first obtained a license as required by section 460 of the act of March 3, 1899, as amended by act of June 6, 1900, and the question before the court was whether the section in question was in conflict with section 8 of article I of the Constitution of the United States, which is to the effect that Congress shall have power of laying all taxes, duties, imposts, excises and port duties and provide for the good defense and general welfare of the United States, and all duties, imposts and excises shall be uniform throughout the United States. The claim was made that as this license tax was imposed only in Alaska, it could not be uniform throughout the United States, and, therefore, was repugnant to the constitutional provisions referred to, and the court held that the license fee was a local tax imposed for the purpose of raising funds to support the administration of local government in Alaska. While speaking of Alaska as one of the Territories of the United States, and citing the Coquitlam case, Mr. Justice Brewer, who delivered the opinion of the court, treats Alaska identically the same as he does the District of Columbia, saying that we are accustomed to the plan generally adopted for the Territories of a quasi State government with legislative and judicial officers and a legislative body with power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different form of government, and in Alaska still another. It has provided

in the District of Columbia for a board of three commissioners who are the controlling officers of the District. For Alsaka Congress has used a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code, having created no legislative body and provided for no local legislation in respect to the matter of revenue, and it has established a revenue system of its own applicable alone to that Territory.

In the use of this word "territory" we take it that the court used the word "territory" in the sense of a landed possession. The court holds that Congress had undoubtedly the power, by direct legislation, to impose this license tax upon the residents of Alaska, providing that when collected it is paid into the treasury of the Territory and disbursed solely for the needs of the Territory, and that if it satisfactorily appears that the purpose of the license tax is to raise revenue for use in Alaska, and that the total revenues derived from Alaska are inadequate for the expense of that Territory, so that Congress is compelled to draw upon the funds of the Nation, the taxes must be held valid. This case in no way involves the question under consideration and can not be taken as authority. The only excuse and reason for its citation is that the court refers to Alaska as one of the Territories of the United States. As we understand the case, it in no way involves the question as to whether or not Alaska is a Territory in the sense in which that word is used in the commerce act, and unless that question was involved the opinion can not be held to be an authority upon the question being considered.

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The question presented for consideration in *Rassmussen* v. *United States* (197 U. S. 516) was whether or not the conviction by a jury of six as provided for in trials for misdemeanors, under section 171, of the act of Congress of June 6, 1900, was a valid conviction. The court held that as, under the treaty with the United States by which the sovereignty over Alaska was acquired, it was provided that the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, this declaration extended the Constitution of the United States to Alaska, and that, therefore, there could not be a valid conviction by a jury of less than twelve, and it was also held that Alaska had been incorporated into the United States and became a part of the United States. This case can not be taken as authority upon the question under consideration and is so easily distinguished that we apprehend no importance can be attached to it as an authority.

There is no question but Alaska is territory of the United States, inasmuch as the United States Government has sovereignty over it, but the term "a Territory," in the course of the evolution of our Government has come to denote a certain form of local government just as much as the word "State" denotes another and different form of local government, and when Congress created the local government for Alaska it adopted a different term, and did not confer upon the inhabitants of Alaska the full rights usually granted in the creating of a local government which is denoted by the term "a Territory." Congress, in the early history of the United States, gave expression to the distinction when it provided for

the local government of what is now known as the District of Columbia, and certainly it can not be claimed that the District of Columbia would come within the term "a Territory" when that term is used in a statute, and by the same token when Congress provided for the government of Alaska it called it, not the Territory, but the "District of Alaska," thus following the nomenclature adopted with respect to that part of the domain in which the seat of government is located. That is the reason Congress specifically named the District of Columbia in section 1 of the commerce act, and it is a fair inference that if it had intended to include Alaska it would have specifically named that district as well. It does not seem to us that it makes any difference whether Alaska is organized territory or not, and the discussion of that point simply tends to befog the question. The Territory, as a possession, was organized, in that Congress provided that certain laws should govern and provided for local executive and judicial departments, but if by "organized" we are to understand that Congress has created a local government giving to the inhabitants the right of making their own local laws for their government through a local legislature and giving the rights and powers which have generally been conceded or granted to the people of the sections of the country which have usually been denoted "Territories," then Alaska certainly is not organized territory. However, it does not seem to us it makes one whit of difference whether we call it organized or unorganized, as the question is simply, Did Congress, by its acts, show an intention to bring Alaska within the purview of section 1 of the interstate-commerce act, or did it evince by its acts the inten-

tion to exclude that act from operation in Alaska? We are to draw our conclusions as to that question from the several acts of Congress relating to Alaska, especially the act of May 17, 1884, creating the local government; the act of June 6, 1900, providing a civil code for Alaska, and the act of May 14, 1898, under which railways were first authorized to be constructed in Alaska; and these are to be read in connection with the interstate-commerce act. Considering them altogether, it seems so clear that Congress has unequivocally shown its intention to exclude Alaska from the interstate-commerce act and to place jurisdiction over Alaskan railways elsewhere, we can not understand any good reason for the contention that the commerce act is in force and effect in Alaska.

II. CONGRESS HAS EXPRESSLY CONFERRED JURISDICTION OVER ALASKAN RAILWAYS UPON THE SECRETARY OF THE INTERIOR BY ACT OF MAY 14, 1898.

Prior to the act of Congress entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898, there was no law under which any individual or corporation could acquire the right to construct and operate railways in Alaska, and, therefore, up to that time the commerce act, even if, as claimed, Alaska was within the purview of the act, had no subject matter to which the application could be made. The right to construct and operate railways in Alaska was given by the act of May 14, 1898, and a right of way was granted over the public land situate in Alaska upon compliance with the requirements of said act. This

grant of right of way is given by section 2 of the act, and the last clause of that section is as follows:

> That all charges for the transportation of freight and passengers on railroads in the **District** of Alaska shall be printed and posted as required by section 6 of an act to regulate commerce as amended on March 2, 1889, and such rates shall be subject to revision and modification by the Secretary of the Interior.

This provision does two things:

(*a*) By providing that the charges for transportation of freight and passengers on railroads in the **District** of Alaska shall be printed and posted as required by section 6 of the commerce act, it brings into force, with regard to Alaskan railways, section 6 of the commerce act, and by the mention and application of this particular section, under the familiar rules of construction, excludes the application of every other section in the act, so that the only section of the commerce act which became applicable to railways in Alaska is section 6.

(*b*) In providing as it did that "such rates shall be subject to ratification and modification by the Secretary of the Interior," Congress conferred jurisdiction over Alaskan railways upon the Secretary of the Interior, and negatived the jurisdiction of the Commerce Commission even if Alaska was apprehended within section 1 of the commerce act, as contended. We do not see how Congress could have more clearly evinced its intention that the Commerce Commission should not have jurisdiction in Alaska. And having conferred the jurisdiction upon the Secretary of the Interior, such jurisdiction will rest with him until

Congress takes some action repealing that part of the act of May 14, 1898.

While the act is to be construed from the language used therein, taken in connection with other acts germane to the subject, the history of the bill upon its passage in Congress is important in casting light upon the intention of Congress. The bill was introduced in the House, passed by that body, went to the Senate, and was there amended. A conference committee was appointed to consider the amendments and reconcile the differences between the Senate and the House. As we understand, the provisions conferring jurisdiction over rates of Alaskan railways was an amendment by the Senate, and in the statement of the conferees, found at page 4507, Congressional Record, volume 31, No. 5, Fifty-fifth congressional session, the conferees say:

> It is also agreed that the Secretary of the Interior may regulate the rates of transportation on railroads for freight and passengers, but that the rates shall be posted as required by the interstate-commerce act.

Mr. Lacey, speaking for the conferees, gave it as his opinion that without the provision the Interstate Commerce Commission would have had jurisdiction, and the House committee preferred to leave the matter with the Interstate Commerce Commission,

> but, on the contrary, the Senate committee contended that inasmuch as the Secretary of the Interior had a full set of officials there, and as these railroads had to be built upon public lands as practically all the government management of the territory or District of Alaska was under the control of the Secretary of the

Interior, it would be safer to leave the regulation and fixing of the rates to be attended to by him; and on that point the House conferees yielded, leaving the matter to be settled by the Secretary of the Interior to prevent extortionate rates. The Interstate Commerce Commission is, of course, located in Washington, thousands of miles away, while the Secretary of the Interior has officials upon the spot constantly in touch with the business of that Territory, and the conferees agreed to accept the views of the Senate in that respect.

Mr. De Vries then asked:

Then the effect of this provision will be to exclude the railroads of Alaska from the jurisdiction of the Interstate Commerce Commission?

To which Mr. Lacey replied:

The companies will fix the rates and as to whether the rates are reasonable or unreasonable will be settled by the Secretary of the Interior.

Mr. De Vries:

He will be the final judge of the rates in Alaska?

Mr. Lacey:

For the time being. It gives him the power to fix the rates. It was thought that would be safer for the people of Alaska than to have a tribunal thousands of miles away, one that could not easily get there.

The question of the Interstate Commerce Commission was considered fully.

Mr. Shafroth, one of the conferees, said:

> That was taken into consideration when it was determined that the Secretary of the Interior should have the right to fix these rates. The question was as to the power of the Interstate Commerce Commission to do so, and when it is remembered that this bill relates absolutely to Alaska inasmuch as the Secretary of the Interior had the machinery there for the purposes of the United States and to determine what should be the rates, why, we thought it could be done better by him than through the Interstate Commerce Commission.

The debate shows clearly the question was discussed as to whether the power should rest in the Interstate Commerce Commission or be conferred upon the Secretary of the Interior, and that Congress, in its wisdom, was of the opinion that the Secretary of the Interior could give a more efficient administration than the Interstate Commerce Commission.

The act itself, we think, clearly shows that Congress, by confining the application of the act to transportation between States, Territories, and the District of Columbia, and not naming the District of Alaska, specifically excluded it, and the debate in Congress above referred to shows beyond peradventure that whether Alaska should be brought within the purview of the act was considered at length and it was decided to leave Alaska without the jurisdiction of the commission.

Not only that, but subsequent amendments have retained the same language, and further, the recent amendment to section 1 of the commerce act, not

only so far as railways are concerned, retains the language heretofore used, but in bringing telegraph and telephone lines within the jurisdiction of the commission, emphasizes the exclusion of Alaskan railways from the operation of the act by adopting the language, State, Territory or district of the United States, so far as telegraph and telephone companies are concerned, and if it had been the intention to include railways Congress would certainly have changed the terms, States, Territories or District of Columbia, throughout the act to State, Territory or districts of the United States.

III. THE ACT OF CONGRESS OF MAY 14, 1898, CONFERRING JURISDICTION UPON THE SECRETARY OF THE INTERIOR IS STILL IN FORCE, AND UNREPEALED.

As we have seen by act of Congress of May 14, 1898, Congress conferred jurisdiction over Alaskan railways upon the Secretary of the Interior. From that time to this it has done nothing specifically to deprive the Secretary of the Interior of that jurisdiction, and confer it elsewhere. It has been contended that the effect of section 10 of the amendatory act of June 29, 1906, which provides—

> that all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law,

impliedly operates as a repeal of the act of May 14, 1898. Does it? We claim that it does not, because there seems to us to be no conflict between the commerce act as amended in 1906 and the act of May 14,

1898. We contend that Congress never conferred any jurisdiction over Alaskan railways upon the Interstate Commerce Commission; that when the occasion arose, requiring jurisdiction over Alaskan railway rates being conferred upon some tribunal, Congress conferred that jurisdiction upon the Secretary of the Interior as the official best situated to deal with the subject; that act relates solely and simply to Alaska and has no effect upon railway rates in any other part of the country.

No rule of construction is better settled than that a general act is not to be considered to repeal a previous particular act unless there is some express reference to the previous legislation on the subject or unless there is a necessary inconsistency in the two acts standing together. As has been said by the Supreme Court of the United States in *ex parte:* In the Matter of Kang-Gi-Shun Ca [Crow Dog] (109 U. S. 556):

> Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. The language of the exception is special and expressed. The words already relied on as an appeal "are general and conclusive." The rule is *generalia spec ralivus non derogant.* The general principle is to be applied, said Bovill, C. J., in *Thorpe* v. *Adams* (L. R. 6, C. P. 135): "To the construction of acts of Parliament, is that a general act is not to be considered to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, or unless there is a necessary

> inconsistency in the two acts standing together." And the reason is, said Wood, V. C., in *Fitzgerald* v. *Champneys* (30 L. J. Ch. 782, 2 Johns. and H. 3154) "that the legislature having had its attention attracted to the special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

It seems to us that the reasons for this rule apply, with particular force, to the question now being discussed. Here we have a law enacted by Congress with express reference to Alaska and, as shown by the debates, it was a mooted question whether or not the jurisdiction over Alaskan railways should rest in the Interstate Commerce Commission or be conferred upon the Secretary of the Interior, and Congress decided that the Secretary of the Interior should have the jurisdiction, and the act was passed accordingly.

To hold that the action of Congress, when considering particularly Alaskan railways, should be repealed by the general repeal clause in a subsequent act, would be contrary to this elementary principle which is applied in construction of statutes wherever the English language is spoken. The reason given by Wood, V. C., and quoted by the Supreme Court in *ex parte* Kang-Gi-Shun-Ca, applies with particular force here: That Congress, having had its attention attracted to the special subject, *i. e.*, control over Alaskan railways, and having observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards, to

derogate from its own act when it makes no special mention of its intention so to do. Had Congress intended that Alaska should be comprehended within the interstate-commerce act, as amended in 1906, would it not have specifically mentioned Alaska, as it has in the corporation-tax amendment to the tariff bill, and use the term, "From one State or Territory of the United States, or Alaska, or the District of Columbia, to another State or Territory of the United States, or Alaska, or the District of Columbia"? This language was used many times in the corporation-tax amendment and voiced distinctly the understanding that Alaska is not comprehended within the expression "States, or Territories," and to hold that Congress intended by this general repeal clause to deprive the Secretary of the Interior of his jurisdiction over Alaskan railways, conferred upon him after careful consideration by Congress, would do violence to all our rules for the construction of statutes. And again has Congress by its action in amendment of section 1 of the commerce act at the last session made clear expression of its intention to leave the jurisdiction over Alaskan railways with the Secretary of the Interior. There is no inconsistency between the act as amended June 29, 1906, and the act of May 14, 1898. Full force and effect can be given to both acts. The jurisdiction over railways, so far as Alaska is concerned, lies with the Secretary of the Interior. Jurisdiction over railways elsewhere in the country lies with the Interstate Commerce Commission, just as Congress intended and provided it should when it passed the previous act. There is nothing in the act as amended to plainly show that the amended act was intended as a substitute, as far as Alaska is concerned.

Numerous decisions of the Supreme Court to the effect that repeals by implication are not favored, might be cited, but the case of Kang-Gi-Shun-Ca referred to so clearly states the principle involved that further citation seems to us unnecessary.

We trust we have placed our position upon the questions involved clearly before the court, and that we have shown by the very terms of the application section of the commerce act, that Alaska was excluded by Congress, and when the question arose for the exercise of jurisdiction over Alaskan railways, Congress conferred that jurisdiction upon another tribunal. That the jurisdiction still rests with the tribunal upon which it was conferred, *i. e.*, the Secretary of the Interior, there having been no repeal expressly made by Congress, and there being nothing necessarily repugnant or contradictory between the act of May 14, 1898, and subsequent acts.

Respectfully submitted.

F. C. ELLIOTT, *Amicus Curiæ.*

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IN THE

Supreme Court of the United States

No. 859.

THE INTERSTATE COMMERCE COMMISSION,
Plaintiff-in-Error,

vs.

THE UNITED STATES OF AMERICA, *ex rel.*
HUMBOLDT STEAMSHIP COMPANY, A CORPORATION,
Defendant-in-Error.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT-IN-ERROR.

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TABLE OF CASES CITED.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

On May 26, 1909, the Humboldt Steamship Company (hereinafter referred to as the relator) filed with the Interstate Commerce Commission (hereinafter referred to as the Commission) a petition, alleging certain violations of the Act to regulate commerce by the White Pass & Yukon Railway Company, operating in Alaska; and asking the establishment of through routes and joint rates between its line and said Railway Company between

Seattle, Washington, and interior Alaskan points, under the power vested in said Commission by virtue of Section 15 of the Act to regulate commerce, as amended.

On June 6, 1910, the Commission announced its decision in the proceeding so instituted (known as No. 2518 on its docket), dismissing the relator's complaint, but "expressly refraining from passing judgment upon the merits of the controversy, because we are constrained to hold, upon authority of the decision recently announced *In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska* (19 I. C. C., Rep. 81), that the commission is without jurisdiction to make the order sought by complainant."

The *ex parte* opinion of the Commission *In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska, supra* (adopted by a vote of four to three), was rendered contemporaneously with the Commission's order dismissing the case brought before it on the complaint of relator (see Rec., pp. 6 and 9). Before announcing its opinion *In the Matter of Jurisdiction*, etc., the Commission had fully heard the testimony and arguments presented by both sides in the actual case instituted before it by relator and no reason appears why its opinion upon the jurisdictional question, announced on the same day, was not included and published as an original proposition with its order dismissing relator's complaint.

On July 16, 1910, the relator filed a petition for rehearing as provided in Section 16-a of the Commerce Act and upon the same being denied (July 19, 1910), a proceeding was instituted in the Supreme Court of the District of Columbia asking for the issuance of the writ of *mandamus* to require the Commission to execute and enforce the Act in the Territory of Alaska, and for general relief.

On January 6, 1911, Mr. Justice Barnard, sitting in the Supreme Court of the District of Columbia, dismissed that proceeding.

An appeal was taken in open court and on May 24, 1911, the Court of Appeals of the District of Columbia reversed the lower court, remanding the cause "with directions to issue a peremptory writ of *mandamus* directed to the Interstate Commerce Commission requiring it to take jurisdiction of said cause and proceed therein as by law required" (Rec., p. 44).

From that decision the Commission sued out a writ of error to this Court. There are eight assignments of error, but only two main questions are involved, to wit:

1. Is Alaska a territory of the United States within the meaning of the language of Section 1 of the Act to regulate commerce, as amended June 29, 1906, which provides, *inter alia,* "That the provisions of this Act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * *from one place in a Territory to another place in the same Territory.*" (Italics ours.)

2. If that question may correctly be answered in the affirmative, then has the Supreme Court of the District of Columbia power to correct the error of the Commission and by writ of *mandamus* require that body "to execute and enforce" in Alaska the provisions of the Commerce Act?

The learned Justice sitting in the Supreme Court of the District of Columbia gave an affirmative answer to the question first above stated, holding that the Commission "has ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory"; but held that the court had no power by writ of *mandamus* "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after

investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The Court of Appeals of the District of Columbia answered in the affirmative both of the questions as above stated.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION OVER RAIL CARRIERS IN ALASKA.

Prior to June 29, 1906, the Act to regulate commerce did *not* apply to any common carriers operating *within* any of the Territories of the United States. On that date, for the first time, Congress extended the application of the Act to any common carrier engaged in the transportation of persons or property by railroad, etc., "from one place in a Territory to another place in the same Territory," the words quoted having then been added as a part of Section 1.

At the same time Congress further amended that Act so as to give the Commission power to "establish through routes and joint rates as the maximum to be charged * * * when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line." (Sec. 15 of the Act to regulate commerce as amended June 29, 1906.)

Subsequent to the amendments above stated, to wit, on May 26, 1909, the Humboldt Steamship Company filed a

petition in the office of the Interstate Commerce Commission, asking for the establishment of through routes and joint rates between its steamship line, operating from Seattle, Washington, to Skagway, Alaska, and the White Pass & Yukon Railway Company, operating between various points in Alaska.

After hearing testimony and argument, the Commission, on June 6, 1910, rendered its decision, dismissing said petition upon the ground that Alaska was not "a Territory" within the meaning of Section 1 of the Act, as above quoted, and that, consequently, the Commission had no authority to pass upon the merits of said petition.

The classes of persons, corporations, carriers, and transportation coming within the purview of the Act to regulate commerce are defined and enumerated in the first section thereof. So much of this section as is deemed pertinent to the determination of the question stated, is as follows:

> "Section 1. That the provisions of this Act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory. * * *"

The question at once arises, is Alaska "a Territory" of the United States within the meaning of this language? If so, there can be no question but that every provision of the Act to regulate commerce is applicable therein, even without Sec. 1891, U. S. Revised Statutes, 1878, which provides:

> "Sec. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere in the United States."

The intention of the Federal Government that Alaska should be incorporated into the United States and should thereby have the benefit of the Constitution and of all general laws passed by Congress seems to have been manifested from the outset, for the treaty by which Alaska was acquired from Russia declares, in Article 3, that "The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

And subsequently Congress expressly declared in Section 1954 of the Revised Statutes, that "The laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, Anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto."

"District" vs. "Territory."

Opposing counsel calls attention to statutes wherein Congress has used the title "District," or "District of Alaska," when referring to Alaska, and basing his argument upon these designations he asserts that Congress intended thereby to limit the character of the government in Alaska to something less than, or different from, a "Territory."

However, a careful examination of the statutes will show that both designations may be used in a proper sense.

(*a*) *Alaska a Customs Collection District.*

The treaty by which the United States acquired Alaska from Russia was proclaimed on June 20, 1867. On July 27, 1868, Congress passed "An Act to extend the laws of the United States relating to customs, commerce and navigation over the Territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes" (15 Stat. L., 240).

The real purpose, however, in passing the Act of July 27, 1868, was to create the customs collection District of Alaska, which was done in Section 2 thereof, in which it is provided:

> "that all of the said territory * * * shall constitute a customs collection district, to be called the District of Alaska, for which said district a port of entry shall be established * * *."

When the revision of 1874 was enacted (Secs. 1954-1976 U. S. Rev. Stat., 1878), Section 2 of that Act was both redrafted and re-enacted into, and became Sections 2591 and 2592 of the U. S. Revised Statutes, 1878, and there appear as follows:

> "Sec. 2591. There shall be in the Territory of Alaska one collection district, as follows:
>
> "The District of Alaska; to comprise all the Territory of Alaska; in which Sitka shall be the port of entry.
>
> "Sec. 2592. There shall be in the collection district of Alaska a collector, who shall reside at Sitka."

And in 1896 Congress passed "An Act to reorganize the customs collection district of Alaska":

> "Be it enacted * * * That the customs collection district of Alaska be, and the same is hereby, reorganized and established to comprise the Territory of Alaska, in which Sitka shall be the port of entry." (29 Stat. L., 60.)

It must, therefore, be conceded that Alaska is the customs collection "District of Alaska," and has been such "District of Alaska" since July 27, 1868, when the United States first extended its laws there. This is not an unusual situation; witness the State of Delaware (U. S. Revised Statutes, 1878, Sec. 2546). As Delaware is both the customs collection "District of Delaware" and the political State of Delaware, so is Alaska both the customs collection "District of Alaska" and the political Territory of Alaska.

(*b*) *Alaska a Judicial District.*

Section 530 of the U. S. Revised Statutes, 1878, divides the United States into judicial districts. This general plan of judicial districts was extended to the Territories; Section 1865 of the U. S. Revised Statutes, 1878, provides:

> "Sec. 1865. Every Territory shall be divided into three judicial districts; and a district court shall be held in each district of the Territory by one of the justices of the Supreme Court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned."

The sections following in the U. S. Revised Statutes, 1878, provide for the appointment of U. S. district attorneys, district clerks and other officers of the district courts of the several districts in the Territories, and that plan was general in all the Territories long before any organization of courts was sought to be made in Alaska.

For sixteen years—from 1868 to 1884—Alaska had no courts, but in the latter year the Act of May 17, 1884, was passed, adopting the district court plan there. However, Congress departed from the general rule, since but one district court was thought to be needed in that Territory, and in the first section of that Act it was provided that Alaska

> "* * * shall constitute a civil and judicial district" (23 Stat. L., 24),

and Section 3 provided:

> "Sec. 3. That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this Act, as may be established by law;
>
> "And a district judge shall be appointed for said district * * *."

Thus Alaska was created and organized into a judicial district in accordance with the general plan, although given but one court instead of three as in the other Territories.

(*c*) *Alaska a Land District.*

The Act of May 17, 1884, also created a land district in Alaska, as follows:

> "Sec. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka."

So that, beginning in 1884, there were three separate legal "Districts of Alaska" in the Territory of Alaska, viz:

the customs collection "District of Alaska," the judicial "District of Alaska" and the land office "District of Alaska," and each of these was created and established under the general plan then and now adopted under our departmental system of government; each of them was, and is, found in all other Territories, and neither has ever heretofore been supposed to detract anything from the political dignity of the Territory in which it existed.

(d) Alaska a Territory.

It is contended by opposing counsel (see pp. 38, *et seq.*, brief for Plaintiff-in-Error) that the Act of May 17, 1884, also affirmatively created and organized Alaska into a "District" for political or general governmental purposes, but the only evidence of such an intention found in that Act is the actual creation and organization therein of the "civil and judicial district" of Alaska.

It is also sought to liken the organization of Alaska to the creation of the District of Columbia (see brief Plaintiff-in-Error, pp. 37, 45, 48-51), but the creation and organization of the District of Columbia was affirmatively performed by Congress, as follows (Sec., 1795, U. S., Rev. Stat., 1878):

> "Sec. 1795. All that part of the territory of the United States included within the present limits of the District of Columbia shall be the permanent seat of government of the United States."

The Act of Congress, approved February 21, 1871, entitled "An Act to provide a government for the District of Columbia," also specifically and officially named the District of Columbia (Section 1, 16 Stat. L., 419).

Each Territory carved out of the public domain in the Western country has thus had its boundaries clearly marked. Section 1896 of the U. S. Revised Statutes, 1878, provided:

> "All that portion of the territory of the United States bounded as follows"

and then follows the description,

> "is erected into a temporary government by the name of the Territory of New Mexico."

Other Territories are thus described and named because, being a part of the great mass of the public domain, it was necessary both to mark the boundaries and to declare the name of the Territory to divide and distinguish it from the general mass or other adjacent Territories.

But this was not true of Alaska. The treaty of cession of June 20, 1867, described the boundaries of that Territory, and as it did not adjoin other portions of our public domain no further description was needed. The treaty also recognized it as a Territory separate and apart from any other. It was not necessary for Congress to create, divide and name it; it was created and set apart from other American territory by the treaty, and when Congress, in the Act of July 27, 1868, named it, as it did eleven times, the "Territory of Alaska," the christening was both sufficient and legal. (See Secs. 1954-1957 U. S. Rev. Stat., 1878).

There is nothing in the Act of May 17, 1884, "An Act providing a civil government for Alaska," which detracts in any way from the description, creation and naming of the Territory of Alaska by the Treaty of Cession and the Act of July 27, 1868. The Act of 1884 created a judicial district in accordance with the general plan of organizing

the courts of the United States. It did, of course, provide in the second section that:

> "* * * there shall be appointed for the said district" (that is the judicial district created by the first section) "a governor, who shall reside therein during his term of office and be charged with the interests of the United States Government that may arise within said district."

But it must be conceded, of course, that where the word "district" is used in the Act of 1884, it refers either to the "Judicial District," the "Customs Collection District" or the "Land Office District" of Alaska. The main purpose of that Act was to create a judicial "District" and extend the territorial district courts to Alaska, to create a land office "District" and extend the land laws in a limited way there; and without accurately differentiating between the name theretofore given by Sections 1955-1957 of the U. S. Revised Statutes, 1878, *i. e.*, the political "Territory of Alaska," and the name used in the Act of 1884—the judicial "District of Alaska," the latter was used in the later Act. The boundaries of the political "Territory of Alaska" were exactly co-extensive in 1884 with those of the judicial "District of Alaska," and the territorial limits of the governor's power and duty were as well described by one as by the other. The governor was, therefore, as correctly the executive "for the said district" as for the said beforenamed "Territory."

This court will not, nor would any other court, presume that Congress intended to reduce the rank of the "Territory of Alaska" as declared in the Treaty of Cession, in the Act of July 27, 1868, and in sections 1955-1957, U. S. Revised Statutes, 1878, and to limit its political power merely by the inaccurate use of a term which does not, of itself,

have any such legal effect. Two districts were created by the Act of 1884—a "civil and judicial district" and a "land-office district." A "customs collection district" existed from 1868. In the organization of every "Territory" before and since the organization of Alaska, each of these "districts" is a part of the internal organization of the "Territory." They are always organized and exist in a territory, and no instance can be found where they have been created or exist outside of a State or a Territory. In the systematic organization of New Mexico and every other Territory, including Alaska, each of these "districts" has existed and their existence has never heretofore been supposed to abolish the political organization known as "Territory."

Counsel for the Commission calls attention to the fact that frequently since the passage of the Act of 1884 Alaska is spoken of in the laws enacted by Congress as the "District of Alaska," but a careful inspection of these laws and an accurate reference to the system of organization of the departments for the internal government of Alaska will show that these references are logically correct. For instance, the Act of March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district" (30 Stat. L., 1253), refers, as it logically ought, to the judicial "district of Alaska" created by the Act of 1884. The Act of June 6, 1900 (31 Stat. L., 321), which contained a complete code of civil law and civil procedure, refers, in every instance, as it ought, to the same judicial district, for it was passed in aid of the organization of the system of law and courts in the "judicial district" of Alaska. A careful examination of all other laws passed for Alaska will conclusively show that they apply either to the customs collection "District of Alaska," the land office "District of Alaska" or the judicial "District of Alaska."

On the other hand, when Congress has been called upon to legislate for the political organization of Alaska, it has used the usual political name and called it the "Territory of Alaska." For instance, in the convention for delimiting the boundaries between Alaska and the Canadian provinces, concluded July 22, 1892 (27 Stat. L., 955), it is agreed in Article I that a joint survey

> "* * * shall be made of the territory adjacent to that part of the boundary line of the United States of America and the Dominion of Canada dividing the Territory of Alaska from the Province of British Columbia * * *."

The Act of June 8, 1906 (29 Stat. L., 267), for the payment of clerk hire in the executive departments

> "* * * is hereby extended to include the Territories of Alaska and Oklahoma."

The Act of May 26, 1900 (31 Stat. L., 211), appropriating additional pay for soldiers on foreign service, provides that their pay

> "* * * in the Territory of Alaska shall be increased ten per centum * * *."

In this connection the Court of Claims in *Grigsby vs. United States,* 43 Court of Claims Reports, 426, say:

> "There is nothing to indicate that Congress meant to take Alaska out of the class of country styled 'Territory,' and make of it a district as contradistinguished from a Territory. It is true that no legislative assembly was provided for Alaska as in other Territories; want of population, we all know, was the reason for

> that. But no purpose can be attributed to Congress to mark any difference between this one part of our domestic possessions and our other domestic possessions except such as arose from location and conditions pertaining to small and inconsiderable settlements. Running through all the statutes referring to Alaska there seems to have been an indiscriminate and interchangeable use of the terms district and territory. This term district as used merely marked the geographical boundaries of a Territory of the United States in the creation of a separate land, revenue, and judicial district. * * * *Alaska is as much a domestic Territory as Arizona.*" (Italics ours.)

The question whether Alaska is a "District" or a "Territory" came squarely before Congress at the time of the passage of the Act of May 7, 1906, "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska." (34 Stat. L., 169.) The Senate bill designated Alaska as the "district of Alaska," while the House bill, prepared by Hon. Frank Cushman, designated it as the "Territory of Alaska." The conference committee to whom the disagreements of the two Houses were referred recommended:

> "That the Senate recede from its disagreement to the amendment of the House, and agree to the same with the following amendment in lieu of and as a substitute for the amendment of the house, to wit:"

Among the amendments the words "district of Alaska" were stricken out and the words "Territory of Alaska" inserted in the bill, and

> "Amend the title so as to read: 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska.'"

The managers on the part of the House reported the result of the conference agreement

> "* * * The effect of which is as follows:
> "1. The words 'Territory of Alaska' are substituted instead of 'district of Alaska,' in the enacting clause and elsewhere, where the whole domain of Alaska is referred to." (House Report No. 3613, 59th Congress, 1st Session.)

The title to the Act and the first section as passed by Congress, and approved May 7, 1906, read as follows:

> "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,"

and

> *"Be it enacted* * * * That the people of the Territory of Alaska shall be represented by a Delegate in the House of Representatives of the United States, chosen by the people thereof in the manner and at the time hereinafter prescribed, and who shall be known as the Delegate from Alaska * * *."

The twelfth section of the Act provides:

> "Sec. 12. That the governor, the surveyor-general, and the collector of customs for Alaska shall constitute a canvassing board for the Territory of Alaska, to canvass * * *."

Section 1862, U. S. Revised Statutes, 1878, provides:

> "Sec. 1862. Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory * * *."

Of course, it must be conceded that Congress has the power to make an exception to this general legislative rule, but since May 7, 1906, the rule has been extended to the organized Territory of Alaska. Whatever may be said of the political status of Alaska prior to this Act providing for the election of a Delegate to the House of Representatives from the "Territory of Alaska," no doubt can now be entertained that the Act established its status as a Territory. Alaska certainly became a Territory on May 7, 1906, if it did not previously have that status, and the Hepburn Act of June 29, 1906, applied thereto as one of the organized Territories of the United States.

LAWS APPLICABLE ONLY TO TERRITORIES.

(a) *Cadets of Military Academy.*

The Military Academy at West Point is recruited as follows (Sec. 1315 Rev. Stat. U. S., 1878; as amended by the Act of June 6, 1900; 31 Stat. L., 645):

> "Sec. 1315. That the corps of cadets shall consist of one from each Congressional district, one from each Territory, one from the District of Columbia, two from each State at large, and thirty from the United States at large."

No cadet had been appointed from Alaska prior to 1906. A prominent army officer on duty in Alaska sought, in 1906, to secure an amendment to an Act of Congress to give Alaska a cadet. He was told that Alaska was then a Territory and was entitled to one under existing law. He asked the Judge-Advocate General, U. S. A., for an opinion, and the Judge-Advocate General, after citing the authorities, concluded:

> "In view of the express legislative and judicial recognition of the status of Alaska as a Territory, it is the opinion of this office that Alaska is a 'territory' within the meaning of Section 1315, Revised Statutes, as amended, and, as such, is entitled to a cadet at the Military Academy."

This opinion was approved by the President and a cadet was immediately appointed from the "Territory of Alaska." If now it shall be held that Alaska is not a "Territory," that action would reverse the executive department and deprive the young men of Alaska of an opportunity to become cadets at West Point.

(b) *Forestry Reservations.*

By the twenty-fourth section of "An Act to repeal timber-culture laws and for other purposes," approved March 3, 1891 (26 Stat. L., 1905), it is provided:

> "Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

Under this Congressional authority to establish forestry reservations in "Territories," the President, on August 20, 1902, by executive proclamation declared and established the Alexander Archipelago Forest Reserve, in Alaska (32 Stat. L., 2025). From time to time since that date the President has reserved other large areas of the public lands in the Tongass, Chugach and other forestry reservations under the law giving him authority so to do in the "Terri-

tories." To hold, now, that Alaska is not a "Territory" would be to overturn the legality of all these Executive Proclamations and the forestry reservations thereunder.

AUTHORITATIVE DECISION.

We shall only quote a paragraph from each of several decisions of this court to show how conclusively the question of the status of Alaska has been settled.

Steamer Coquitlam vs. United States, 163 U. S., 346 (May 18, 1896).

"But we are of the opinion that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the Act of 1891 upon the Circuit Court of Appeals to review the judgments of the Supreme Court of any Territory, assigned to such circuit by this court. That act was necessarily so interpreted by this court when, by its order of May 11, 1891, 139 U. S., 707, Alaska was assigned to the Ninth Circuit. Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the Act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory. No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska, in which the court of last resort is designated the District Court of Alaska."

Binns vs. United States. 194 U. S., 486 (May 31, 1904).

"It had been theretofore held by this Court in Steamer Coquitlam vs. United States, 163 U. S., 346-352, that 'Alaska is one of the Territories of the

United States.' * * * Nor can it be doubted that it is an organized Territory, for the Act of May 17, 1884 (23 Stat., 24), entitled 'An Act providing a civil government for Alaska,' provided, 'that the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided.' "

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* State government, with executive, legislative, and judicial officers and a legislature endowed with the power of local taxation and local expenditures, *but Congress is not limited to this form.* In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory, or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may intrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory."

Opposing counsel contends that Mr. Justice Brewer, in this case, "treats Alaska identically the same as he does the

District of Columbia" (p. 48, brief Plaintiff-in-Error). It is difficult to see how such an argument can fairly be predicated upon anything appearing in the *Binns* case; especially in view of the positive declaration—made all the stronger by the extended discussion of the different forms of government—that "Alaska is one of the Territories of the United States. * * * Nor can it be doubted that it is an organized Territory."

There is no analogy between the status of Alaska and of the District of Columbia. The latter is the seat of government, has no delegate in Congress and will never be admitted to Statehood; its status as a "District" is prescribed by the Constitution, and it is the only "District" existing under that instrument, which deals only with States, Territories, and the "District of Columbia." It would be going far afield to engraft another District on to the Constitution in order to defeat the legislative intent with respect to the Territory of Alaska.

Rasmussen vs. United States, 197 U. S., 516 (April 10, 1905).

Here this court examined and affirmed its decisions in the foregoing cases, again declaring that

> "Alaska is one of the Territories of the United States."

It follows, too, from the language of the majority and concurring opinions that Alaska is not only a Territory, but it was declared to be "an organized Territory" under the Act of 1884.

It is also to be noted that this court in the ***Rasmussen*** case referred to the fact that it had previously considered the very point which was argued below as to the difference

between "the Territories" of the United States and "territory" in the broader sense, and the contention that Alaska is simply a part of "the territory" and not *one of the Territories* of the United States is rejected, as witness this language:

> "Presumably it was also a consideration of the character of the rights conferred by the treaty by which Alaska was acquired, and the legislation of Congress concerning that Territory, to which we shall hereafter refer, which caused Mr. Justice Gray, in his concurring opinion in Downes vs. Bidwell, to say (p. 345):
>
> > " 'The cases now before the Court do not touch the authority of the United States over the Territories, *in the strict and technical sense,* being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada, and the Republic of Mexico, *and the Territories of Alaska* and Hawaii, but they relate to territory *in the broader sense,* acquired by the United States by war with a foreign state.' " (Italics ours.)

Subsequent to the decision of these cases, Congress expressly recognized the status of Alaska as a Territory by the Act of May 7, 1906, providing for the election of a Delegate to the House of Representatives from the "Territory of Alaska."

The Attorney-General of the United States (Hon. W. H. H. Miller) on December 19, 1890, rendered a formal opinion in which he held that Alaska was "a Territory" and as such entitled to two Commissioners at the Columbian Exposition (19 Opinions of Attorneys-General, p. 700).

See also the recent case of *Nagle vs. United States,* decided by the United States Circuit Court of Appeals, Ninth Circuit (191 Fed., 141).

To summarize:

(1) The Judicial Department—The Supreme Court of the United States, in the *Coquitlam, Binns* and *Rasmussen* cases, holds Alaska to be an "organized Territory," said decisions having been followed by the Circuit Court of Appeals in *Nagle vs. United States,* 191 Fed., 141; and by the lower courts in the instant case.

(2) The Executive Department—The President in all Forestry Reservation Proclamations, and in the Military Academy case, holds Alaska to be a "Territory."

(3) The Legislative Department—the Congress of the United States, in Sections 1954-1957, U. S. Revised Statutes, 1878, and in "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," May 7, 1906, specially declares Alaska to be a "Territory."

(4) The State Department in dealing with Great Britain in the matter of the boundary between Alaska and the Canadian provinces declares Alaska to be a "Territory."

(5) Both the Attorney-General of the United States and the Court of Claims have held Alaska to be a "Territory."

(6) Not a single court or department of the government (other than the Interstate Commerce Commission) has declared the political status of Alaska to be that of a "District"—something less than a "Territory." Such a conclusion in this case would overturn the well-settled law under which the Territory has prospered for twenty-six years, and under which the rights of its citizens have been thought to be settled.

Alleged Conflict of Authority.

Interstate Commerce Commission

vs.

Secretary of the Interior.

Opposing counsel contends that jurisdiction over Alaskan railways was conferred upon the Secretary of the Interior by the Act of May 14, 1898, which is a general law extending to that Territory the Homestead Laws, providing for the incorporation of railways, relating to rights of way, etc., Section 2 providing, "that all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by Section 6 of the Act to regulate commerce as amended on March 2, 1889, and such rates shall be subject to revision and modification by the Secretary of the Interior."

The first section of the Act to regulate commerce, passed June 29, 1906, extends all the provisions of that Act to common carriers operating in the Territories of the United States, and Section 10 provides "That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed."

It is, of course, elementary that repeals by implication are not favored. But where the intention of Congress is manifest, it is settled beyond any question that even a later general act will repeal a prior special act in conflict therewith. *Louisville Water Company vs. Clark*, 143 U. S., 1, 11; *Union Pacific Railway Company vs. Cheyenne*, 113 U. S., 523. If Alaska be one of "the Territories" of the United States there can be no doubt that the Act to regulate commerce applies *ex proprio vigore* and without special reference to that Territory by name.

> "When the provisions of two statutes are so far inconsistent with each other that both cannot be enforced, the latter must prevail." *Cass vs. Dillon,* 2 Ohio State, 607, 610-611.

It needs no argument to show the inconsistencies between the law of May 14, 1898, investing the Secretary of the Interior with authority to revise and modify rates of transportation in Alaska, and the Act to regulate commerce, as amended June 29, 1906, and June 18, 1910, investing the Interstate Commerce Commission with the same power.

It is urged (see pp. 57, *et seq.*, brief for Plaintiff-in-Error) that the law passed on May 14, 1898, is a "special" and the Act to regulate commerce a "general" law. Upon this theory the argument is made that "in passing a special act the legislature had its attention directed to the special case which the act was made to meet, and considers and provides for all the circumstances of that special case; and having done so it is not to be considered that the legislature, by a subsequent general enactment, intended to derogate from the special provision previously made where it was not mentioned in such enactment."

The principle so stated may not be controverted but it cannot be applied to this case. True, the law of May 14, 1898, related solely to Alaska, but it dealt mainly with matters other than the regulation of railroad rates, and the provision which it is claimed invests the Secretary of the Interior with and divests the Interstate Commerce Commission of such authority was added as an amendment to the law as it originally passed both houses of Congress, and is a comparatively minor section. The law of May 14, 1898, was, therefore, a *general* law relating to diverse and unrelated subjects, whereas the Act to regulate commerce of June 29, 1906 (the date upon which it was first extended to intraterritorial rates), is a ***special*** law, directed solely to the regulation of railroad rates, etc.,

and administered by one properly qualified body to insure its uniform and efficacious application throughout the country.

In this connection it may be important and instructive to note the history and causes which led up to the enactment of the Act of May 14, 1898, which counsel claim confers jurisdiction upon the Secretary of the Interior in relation to Alaskan railways. When that act was passed the so-called "Maximum Rate Case" was fresh in the minds of Congress, having been decided by this court the previous year. (*Interstate Commerce Commission vs. C. N. O. & T. P. Ry. Co.*, 167 U. S., 479, decided May 24, 1897.) That decision made a nullity of the original Act to regulate commerce so far as any *effective* power of regulation was concerned. Practically the only provision of the old law which retained virility was Section 6, and it will be noted that this section, as to filing tariffs, was made a part of the act conferring jurisdiction on the Secretary of the Interior. Now, being desirous to insure effective regulation of railroad rates in Alaska, and being aware that such regulation could not be had under the Act to regulate commerce as then but recently interpreted by this court, Congress *for that reason* conferred the power to regulate rates in Alaska upon the Secretary of the Interior. Nothing could be done for Alaska under the general act which the Commission administered until the whole question affecting the entire country had been considered and a new and more efficient law secured. The easiest way out of the dilemma, therefore, was found in the passage of this temporary expedient for providing regulation in Alaska, and the power was conferred upon the Secretary of the Interior.

The debates in Congress at the time the Act of May 14, 1898, was passed bear out this theory of the considerations

which prompted Congress thereby to place jurisdiction over Alaskan railways in the hands of the Secretary of the Interior.

(*See proceedings of May 4 and 5, 1898, in the House of Representatives, pages 4599-4600 and 4635, Vol. 31, Part 5, Congressional Record, 55th Congress, 2d Session.*)

Under the Act as amended June 29, 1906, and June 18, 1910, again placing the power of effective regulation in the hands of the Interstate Commerce Commission and providing all necessary machinery, including special examiners and agents with ample inquisitional powers, it must be apparent that the Commission is far better equipped to do this work than is the Secretary of the Interior. Hence, why should Congress when amending this act so as to make it more efficacious for the benefit of the whole country, exclude Alaska from its beneficent operation and rely for regulation in that vast Territory upon the law of May 14, 1898, which is far less effective *and which cannot afford the primary relief which is sought in this case, i. e., the establishment of through routes and joint rates?* We think the debates in Congress conclusively show the reasons which impelled it *temporarily* to vest the Secretary of the Interior with authority to modify rates in Alaska; and we think it has been demonstrated that these reasons are not controlling today, and that such authority has been withdrawn by the later enactment.

Absolutely no reason has been suggested to show why this remedial act (encompassed only after much agitation) is not just as essential to the well being of Alaska as to that of any other part of the United States, and if the expediency of its application should be given weight in arriving at the legislative intent, it will not be seriously questioned that the process which the Act affords is as necessary to the proper regulation of intraterritorial rates, etc., in

Alaska and to the correction of wrongs such as that complained of in this case, as in New Mexico or Arizona. If it be conceded that the country derives benefit from this law, there should be most weighty reasons for denying its application to any particular part of the country. Nor do we think for one moment that the Commission has sued out the writ of error to this court for the purpose of evading its responsibilities under the decision of the Court of Appeals of the District of Columbia herein; on the contrary we think the Commission merely desires to avail itself of this opportunity to obtain from this court a final expression concerning its duty in Alaska so that it will not be necessary at some future time again to litigate the question through the courts when an affirmative order shall be made by the Commission in some other proceeding.

Reference is made to the fact (see pp. 12-13, brief for Plaintiff-in-Error), that "at the time the amendment of June 29, 1906, was made the Congress was acquainted with the rulings of the Commission, that the District of Alaska is not a Territory of the United States within the meaning of Section 1 of the Act to regulate commerce, and that the Commission has no authority or jurisdiction over carriers engaged in the transportation of passengers or property within the District of Alaska, and its action in extending the jurisdiction of the commission to districts of the United States other than the District of Columbia in connection with the business of telegraph, telephone, and cable companies, and also in connection with the transportation of oil and other commodities, except water and natural or artificial gas by pipe lines, and partly by pipe lines and partly by railroad, and partly by pipe lines and partly by water, but refusing to so extend the jurisdiction of the Commission so far as other transportation is concerned, must be taken to be an approval of the Commission's interpretation of said Act."

We assume that this argument is based upon that portion of Section 1 of the amendment of June 18, 1910, to the Commerce Act which is quoted on pp. 11-12 of brief for Plaintiff-in-Error, and not upon the amendment of June 29, 1906; for it does not appear that prior to June 29, 1906, the Commission had ever announced any rulings "that the District of Alaska is not a Territory of the United States within the meaning of Section 1 of the Act to regulate commerce," and, therefore, it is difficult to conceive how Congress can be presumed to have been "acquainted" with or to have approved of any such "rulings." One very cogent reason why there had been no occasion for any formal ruling by the Commission relating to the status of Alaska prior to its dismissal of this case (instituted May 26, 1909) without a decision on the merits, was that prior to the amendment of June 29, 1906 (which did not become effective until sixty days thereafter), the Act to regulate commerce did *not* apply *within* Alaska or any other of the Territories of the United States, as pointed out at p. 4, *supra*.

Nor could Congress, when it adopted the amendment of June 18, 1910, have had any very great opportunity to ponder over the error committed by the Commission on June 6, 1910, in denying the application of the Commerce Act to Alaska; but presumably Congress *was* conscious of the several rulings of this court, which, as it had a right to assume, finally settled the status of Alaska as a Territory. Because Congress does not set its cumbersome machinery in motion to correct the error of the Commission *within twelve days after the same was made public* certainly affords no ground for the argument that thereby Congress acquiesced in and ratified the error. It is also proper to note that almost invariably the announcements of the Commission's decisions are not made until sometime after the dates shown

on the printed reports thereof; *as a matter of fact the records of the Commission show that in this particular case notices, accompanied by the report and order herein, were not even sent out by the Commission to the parties at interest until June 28, 1910, or just ten days subsequent to the adoption by Congress of the amendments of June 18, 1910.*

In passing the amendment of June 18, 1910, Congress was charged with and actually had knowledge of previous enactments and court decisions defining Alaska as "a Territory," and hence it is fair to assume that the language referred to was used with cognizance of the legal and technical meaning necessarily attaching thereto. As has been already pointed out, this court has repeatedly held Alaska to be "a Territory," and therefore Congress cannot be presumed to have intended to include Alaska by use of the word "district." In covering the business of telephone, telegraph and cable companies under the provisions of the Act by the language "District of the United States," as used in Section 1, Congress evidently meant the District of Columbia and possibly the Philippine Islands and Isthmus of Panama. Certainly if Congress intended to negative the inclusion of the business of *common carriers* in Alaska under the term "territory" as used prior to the amendment of June 18, 1910, a more positive method would have been employed in view of the decisions of the courts that Alaska is "a Territory." It must, therefore, be apparent that so far as carriers by railroad are concerned, the present Act leaves them exactly where they were prior to the adoption of the last amendment to Section 1, and this court having held Alaska to be "a Territory," carriers operating therein are still subject to the jurisdiction of the Interstate Commerce Commission, notwithstanding any later expression directed specifically to the business of telephone, telegraph and cable companies "from one District of the United States to any other District of the United States."

The Townsend bill (H. R. 17536) to which counsel for the Commission directs attention (p. 13, brief Plaintiff-in-Error) in support of his argument on this point was merely reported to the House on April 1, 1910—more than two months prior to the denial by the Commission of its authority in Alaska and therefore before any alleged necessity arose for bringing that Territory within the terms of the Act by inserting therein the word "district." Presumably, therefore, the failure of Congress to pass this bill was due to a natural aversion to the doing of an unnecessary thing.

Likewise the so-called Fletcher bill (S. 9975), (p. 14, brief Plaintiff-in-Error) introduced in the Senate on January 9, 1911, probably failed of passage because Congress assumed that after the Supreme Court of the District of Columbia had expressed the view on January 6, 1911, "that the Interstate Commerce Commission has ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory," the Commission would proceed without further coercion "to execute and enforce" this remedial statute in that Territory.

We respectfully submit that the argument appearing at pages 16, *et seq.*, of brief for Plaintiff-in-Error, to the effect that Congress has acquiesced during a period of more than nineteen years "in the Commission's conclusion in this regard concerning its jurisdiction," does not merit serious consideration. The argument answers itself, for on page 19 of his brief counsel for the Commission says "it is clear that at the time the Act to regulate commerce was passed the Congress did not intend to confer upon the Commission the jurisdiction here in question, because at that time there were no railroads in Alaska." The non-existence of railroads there at the time of the creation of the Interstate Commerce Commission in 1887 must be considered a very substantial reason why no authority was conferred upon the Commission over railroads in that Territory at that time.

But when in 1906 Congress passed the amended Act, greatly strengthening and enlarging the authority of the Commission, railroads had been constructed in Alaska and they needed as much, perhaps more, regulation than the railroads anywhere else in the United States. And when Congress in that Act repealed all laws in conflict therewith that put an end to the very incomplete authority formerly exercisable by the Secretary of the Interior by virtue of a minor amendment inserted in the Homestead Laws of May 14, 1898.

The brief filed on behalf of certain interested railroads by F. C. Elliott as *Amicus Curiae* in the courts below (see p. 33, brief Plaintiff-in-Error) attempts to explain the opposition manifested by the railroads in Alaska to the jurisdiction of the Commission upon the ground that "our rate schedules have already been filed with the Secretary of Interior, as required by the Act of Congress of May 14, 1898, entitled 'An Act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes'; and to be required to file our schedules with the Commerce Commission, and comply with the many rules and regulations of the commission, will entail upon this small railway an amount of unnecessary work and detail which would be burdensome in the extreme."

However, it is to be noted that the Act of May 14, 1898, which is claimed to be still operative as conferirng jurisdiction upon the Secretary of the Interior, provides "that all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by Section 6 of an act to regulate commerce as amended on March 2, 1889"; and further in the same section of that act it is provided, "and such rates shall be subject to revision and modification by the Secretary of the Interior." Now, it seems plain that that clause

of the section above quoted, requiring carriers in Alaska to print and post all charges as required by Section 6 of the Act to regulate commerce, already makes it legally encumbent upon Alaskan railroads to file their tariffs with the Interstate Commerce Commission, since Section 6 of the Commerce Act provides, *inter alia*:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation," etc., and "the Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.
>
> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carier have been filed and published in accordance with the provisions of this Act"; etc.

Our claim in this regard apparently is conceded at p. 53 of brief for Plaintiff-in-Error. It will therefore be seen that the law which, it is claimed, still vests authority over Alaskan carriers in the Secretary of the Interior, has been so little regarded or complied with that the attorney for one of the most important railroads in Alaska *is not even acquainted with its requirements.* And as to the only practical objection which they have thought expedient to urge against the jurisdiction of the Commission, it clearly appears that the repeal of the law which once vested authority in the Secretary of the Interior has resulted in no change in their legal obligations. It is, therefore, fair to assume that there is some more potent reason for the objection of those railroads to the jurisdiction of the

Commission than that assigned by the distinguished *Amicus Curiae* in the courts below.

Since this whole question turns upon the point as to whether Alaska is "a Territory" of the United States, if this be answered in the affirmative there can be no doubt but that the amended Act to regulate commerce passed June 29, 1906, and the later amendments of June 18, 1910, repealed that particular clause of the Homestead Laws of May 14, 1898, vesting authority in the Secretary of the Interior, and today the jurisdiction of the Commission is complete and sole in respect to rates, routes, and practices of common carriers by railroad within the Territory of Alaska.

This would be so even without that clause in Section 10 of the Act as passed June 29, 1906, providing "that all laws and parts of laws in conflict with the provisions of this Act are hereby repealed." *Henrietta Mining & Milling Co. vs. Gardner,* 173 U. S., 148.

> "Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. * * * In *United States vs. Tynen* it was said by Mr. Justice Field that 'even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' * * * This is undoubtedly a sound exposition of the law." *Henderson's Tobacco Company,* 11 Wall., 657.

Concededly there is repugnancy between the Act of May 14, 1898, which gave the Secretary of the Interior power to modify railroad rates in Alaska, and the Act to regulate commerce as amended June 29, 1906, and June 18, 1910,

for it is sought to be shown that *because of the former* the Interstate Commerce Commission is charged with no duty in Alaska under the latter.

II.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAS POWER IN THIS CASE TO CORRECT THE ERROR OF THE INTERSTATE COMMERCE COMMISSION AND BY MANDAMUS TO REQUIRE THAT BODY "TO EXECUTE AND ENFORCE" IN ALASKA THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

(a) It is not open to question that the Supreme Court of the District of Columbia, sitting as a Circuit Court, has original jurisdiction to issue the writ of mandamus in a proper case.

It is well settled that mandamus lies if there be no other specific legal remedy. *Marbury vs. Madison,* 1 Cranch., 163; *Knox Co. vs. Aspinwall,* 24 How., 376; *United States vs. Boutwell,* 17 Wall, 604; *Brownsville Taxing District vs. Loague,* 129 U. S., 493; *Ex parte Pennsylvania Company,* 137 U. S., 451; *Brody vs. Seymour,* 10 App. D. C., 567.

And as said in the instant case by Justice Van Orsdel, speaking for the Court of Appeals of the District of Columbia:

> "The common law jurisdiction of the Supreme Court of the District of Columbia, sitting as a Circuit Court, to issue the writ of mandamus against an officer of the Government in a proper case will be conceded. It likewise follows that similar power is vested in the court to command the performance of a

duty purely legal and in which no act of judgment or discretion is involved by an official board or commission of the Government. This power has been so long and so frequently exercised as to admit of no doubt of the existence of the authority. *Kendall vs. United States,* 12 Pet., 524; *Decatur vs. Paulding,* 14 Pet., 497; *United States vs. Schurz,* 102 U. S., 379; *Garfield vs. Goldsby,* 211 U. S., 249; *Parish vs. MacVeagh,* 214 U. S., 124."

(b) The question therefore is: WAS the Court of Appeals of the District of Columbia correct in holding that this is a proper case for the issuance of the writ.

Counsel for the Commission say (see pp. 26-27, brief Plaintiff-in-Error):

"The steamship company says it is the duty of the Commission to execute and enforce the provisions of the Act to regulate commerce, but it is evident that before making any order in that connection the Commission must ascertain whether or not the act has been violated; that is to say, it must assume and exercise jurisdiction to the extent of developing the pertinent facts and then in the exercise of its judgment decide whether or not the facts show that a violation has taken place, and that is exactly what it did in the proceeding instituted before it as aforesaid. It will be seen that at the time the Commission rendered its decision in the premises and made the order complained of, it might have rendered a contrary decision and made an order of a very different nature. At that time the Commission had taken all the steps necessary to enable it to pass upon and decide every question of law and of fact pertaining to said proceeding, and if, instead of deciding as it did, it had decided that the contentions of the steamship company were correct, it might have made an order against the carriers complained of requiring them to cease and desist from do-

> ing in the future certain things they had done in the past, or to do in the future certain things they had neglected to do in the past, or both. If the decision, instead of being against the steamship company, had been against the carriers, could it have been reviewed, reversed, or corrected in a proceeding in mandamus? Certainly not; because a decision of that kind can be reviewed only in a court of equity, and under these circumstances we fail to see why the Commission rendered itself more liable to a proceeding in mandamus by deciding against the steamship company than it would have been had it decided against the carriers. In either case, the exercise of judgment would have been necessary, but no more necessary in the one case than in the other. What the Commission did, not what it neglected or refused to do; in other words, the action taken by the Commission in making its report and order as aforesaid, not the neglect or refusal of the Commission to act, not the failure of the Commission to assume and exercise jurisdiction in the premises, is the subject-matter of complaint."

It is of course unnecessary to point out to this court the exceptional speciousness of this argument; but we do so briefly merely as a matter of convenience.

The Commission was not called upon to "assume and exercise jurisdiction to the extent of developing the pertinent facts and then in the exercise of its judgemnt decide whether or not the facts show that a violation has taken place," and this is exactly what it did *not* do "in the proceeding instituted before it as aforesaid." The hearing before the Commission was not directed to developing, nor did it develop, a single fact which was pertinent to the determination of the only question concerning which the Commission expressed an opinion in dismissing relator's complaint; no testimony was introduced before the Commission to prove that Alaska is or is not a Territory, and conceding, *arguendo,* that the status of Alaska is a question of

fact, it is absurd to say that Congress intended to commit such a question to the Commission for final decision. So far as the decision of that question was concerned (and that was the only question which can be alleged to have been decided by the Commission), all the "testimony" submitted to the Commission in this case might just as well have been stricken from its records, because every syllable of such testimony related to the question of discrimination and as to whether or not the through routes prayed for should be established by the Commission as a matter of justice and right, etc.; no "evidence" submitted, or which could be submitted, would have been competent upon the question as to the legal status of Alaska—*such a question is not to be established by the testimony of witnesses, however numerous and credible, but is one of law, and the power finally to determine it was never intended to be vested in the Commission.*

Counsel for the Commission undoubtedly is correct in saying that if the decision of the Commission, instead of being against relator, had been against the railroads, it could not have been reviewed, reversed, or corrected in a proceeding in mandamus; but we respectfully submit he is just as surely incorrect in arguing, *e converso*, that "under these circumstances we fail to see why the commission rendered itself more liable to a proceeding in mandamus by deciding against the steamship company than it would have been had it decided against the carriers. In either case, the exercise of judgment would have been necessary, but no more necessary in the one case than in the other."

It would seem proper merely to point out that any order entered by the Commission against the railroads in this proceeding necessarily would have been one of an affirmative nature; that is, one laying some positive obligation, duty or requirement upon them. If thereby the railroads had ap-

prehended that their rights were invaded they would have had open to them the remedy by suit in equity to enjoin such order if found to be unwarranted, which remedy is specially reserved to them in the Act to regulate commerce itself. Such suits come here every day. It may be that in certain cases where a complainant before the Commission has had his cause dismissed, as he thinks erroneously, he also may in like manner proceed in equity to have the order of dismissal annulled, set aside or enjoined. We understand that question is now pending before this court. But even if the right to proceed in equity in such a case shall be found to exist the function of the writ of mandamus, which is of time honored utility, cannot be thereby entirely superseded.

Counsel for the Commission upon this branch of his argument claims that "the exercise of judgment" was manifested by the Commission in its dismissal of relator's complaint to the same extent as would have been done had an affirmative order been made against the railroads—that "In either case, the exercise of judgment would have been necessary but no more necessary in the one case than in the other." But if the Commission had made an affirmative order in the case as presented to it, necessarily its judgment would have been exercised in determining that it was reasonable and proper that the railroads should be required to form the through routes as prayed for by relator; in the disposition which it did make of the complaint the Commission merely expressed the opinion that Alaska is not a Territory and declined to come to the point of exercising the judgment or discretion committed to it. If this court declares Alaska to be a Territory within the meaning of the Act to regulate commerce then there is no escape from the conclusion that the Commission failed in the performance of the ministerial duty "to execute and enforce" the Act,

with which duty it is charged by Congress; and by no "exercise of judgment" can the Commission cast off a duty so imposed.

To quote further from the opinion of the Court of Appeals, D. C., in this case (Rec., pp. 49-51):

> "This brings us to consider whether this case is one calling for the exercise of jurisdiction by mandamus. Blackstone in his Commentaries, Vol. 3, 110, defines the writ of mandamus to be 'a command issuing in the King's name from the court of king's bench, and directed to any person, corporation or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.' Before this extraordinary process will issue it must appear that the Interstate Commerce Commission is an official body to whom, on legal principles, the writ may be directed. It also must appear that the relator is without any other legal remedy. Referring to the latter point, when relator's complaint was dismissed for lack of jurisdiction by the Commission, it applied for a rehearing, as provided in the Interstate Commerce Act. When that application was denied, relator had no specific remedy, either in law or equity, except by mandamus.
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> * * * * * * * * *
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> "In respect of the enforcement of the orders of the Commission it is provided that 'if any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in dis-

obedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives from further disobedience of such order, or to enjoin upon it or them obedience to the same.' (36 Stats. L., 555.)

"Thus it will be observed that by the provisions of the last general Act of Congress conferring power and jurisdiction upon the Interstate Commerce Commission, the Commerce Court was created. Cases from the Commission do not reach that court by the usual avenue of appeal, but by original proceedings to enforce or restrain the orders of the Commission. A careful review of the Acts conferring jurisdiction upon the Commission fails to disclose the bestowal by Congress upon it of any of those powers to enter judgments and decrees belonging to courts of general jurisdiction. Its acts are administrative, and not judicial. Like all executive and administrative officers and boards of the Government, it possesses *quasi* judicial functions which require the exercise of judgment and discretion in deciding questions of fact and applying the law thereto as defined in the statutes. But it takes more than this to make a court of general or special jurisdiction. The power that resides in courts to enter final judgments and decrees and to enforce them is wanting in this Commission. Its duty is confined to administering powers conferred on Congress by the Commerce Clause of the Constitution, and delegated, under proper limitations, to the Commission to administer."

In the case of *Noble vs. Union River Logging Railroad Co.*, 147 U. S., 165, this court, speaking through Mr. Justice Brown, said:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act

> of a head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation vs. McComb*, 92 U. S., 531, 541: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other.'"

The case of *Noble vs. Union River Logging Railroad Co., supra*, was cited with approval by this court in *Garfield vs. Goldsby*, 211 U. S., 249, 261, and the Court, speaking by Mr. Justice Day, said (p. 262):

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous Acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary *where he acts within the powers conferred by law*. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon

> him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." (Italics ours.)

(c) The relief sought by the relator and whether or not such relief required the exercise of an administrative or judicial discretion.

What relief is sought by the relator?

1. That the writ of mandamus require and command the Commission to take jurisdiction of the matters and things in its complaint, and to pass upon the merits of the case so presented to it for determination.

Counsel for the Commission urges (1) that of the matters and things set up in the complaint the Commission has no jurisdiction and (2) that it exercised a judicial discretion in so holding.

The question of jurisdiction in a particular case, where the facts are admitted or found, is a pure question of law and although the deciding body may have exercised a discretion, if there has been an abuse thereof, mandamus will lie to correct the error. *Virginia vs. Rives,* 100 U. S., 313; *Virginia vs. Paul,* 148 U. S., 107; *In re Christiensen Engineering Co.,* 194 U. S., 458; see also *Ex parte Harding,* 219 U. S., 363.

In *Ex parte Brown,* 116 U. S., 401, it was said to be elementary that

> "mandamus will lie to compel a court to take jurisdiction in a proper case but not to control its discretion while acting within its jurisdiction."

U. S. vs. Fossatt, 21 How., 445; *Ex parte Russell,* 13 Wall., 664; *Parker, petitioner,* 131 U. S., 221; *In re Hohorst,* 150 U. S., 653; *Ex parte Newman,* 14 Wall., 152.

But it is said that in order to arrive at the decision that it had no jurisdiction, the Commission was compelled to read and construe the law, and, therefore, it exercised judgment or discretion. In support of this contention opposing counsel cites (p. 21, brief Plaintiff in Error) *Kimberlin vs. Commission to Five Civilized Tribes et al.*, 104 Fed., 653, 655, 658. However, we respectfully submit that a construction of the law by the Commission does not defeat relator's right to mandamus in order to have the law correctly construed and enforced; and the doctrine in the *Kimberlin* case, *supra*, relied upon by Plaintiff in Error, is directly in conflict with the pronouncement of this Court in *Roberts vs. U. S.*, 176 U. S., 221, 231, as follows:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore in a certain sense construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although dependent upon the statute which requires, in some degree, a construction of its language by the officer. Unless this be so the value of this writ (mandamus) is very greatly impaired." (See also *U. S. ex rel. Parish vs. MacVeagh*, 214 U. S., 124.)

On this point we quote from the opinion of the Court of Appeals of the District of Columbia in the instant case, as follows (Rec., pp. 51-52):

"It is insisted that the Commission, in arriving at a decision that it was without jurisdiction to consider relator's complant, exercised judicial discretion, and that mandamus will not lie to compel it to take jurisdiction. After the petition was filed by relator, evidence was taken and a hearing had at which arguments were made. It was upon consideration of the case so presented that a decision was reached by the Commission that it was without jurisdiction in the premises. It is elementary law that a writ of mandamus will issue to require an inferior court to assume jurisdiction of and decide a matter within its jurisdiction and pending before it for judicial determination, but the writ will not issue to control its decision. *Ex parte Flippin*, 94 U. S., 348; *Ex parte Railway Co.*, 101 U. S., 711; *Ex parte Burtus*, 103 U. S., 238; *Ex parte Morgan*, 114 U. S., 174.

"It is well settled that where the question of jurisdiction is a peremptory one enjoined by law, it matters not that the officer, board or tribunal may have granted a hearing before deciding that issue. If jurisdiction depended upon the ascertainment or determination of some preliminary fact or facts, the case would be different. It would not in that instance be solely a question of law, and mandamus would not lie to direct the action that should be taken in deciding the preliminary issues of fact. In determining whether or not an officer, tribunal, commission or board has jurisdiction to act in a given case, there can be no such thing as preliminary or temporary assumption of jurisdiction where no jurisdictional facts are involved. When jurisdiction is expressly imposed by law, no amount of preliminary inquiry to determine that question can deprive the party injured by an erroneous ruling thereon of his right to have such ruling corrected, and, in the absence of any other legal remedy, he is entitled to the relief afforded by mandamus.

"In the case at bar the power of determining in what particular territory the Commission shall exercise jurisdiction is not left to its discretion. No question

of fact is involved in its determination. Its jurisdiction in that respect is defined by the positive declaration of the law-making power. It is purely a question of law, and not one of fact, or of mixed law and fact. No exercise of discretion by the Commission in its administrative capacity is involved in passing upon the extent of its territorial jurisdiction under the Act of Congress. It matters not, therefore, the extent of the hearing indulged by the Commission in this case before it arrived at the conclusion that it was without jurisdiction. The law is mandatory upon it to take jurisdiction within the territorial limits defined in the Act. It is the power of the Commission to act that is before us, and not the expediency or manner in which it shall act under the jurisdiction imposed. It logically follows from the contention of counsel for the Commission that, if its decision that it is without jurisdiction in Alaska is not reviewable by the courts, it is within its power to declare itself without jurisdiction in Ohio, and such a decision would be for the same reason beyond correction by the courts. The same reasoning ultimately leads to the conclusion that it is within the power of the Commission to entirely divest itself of jurisdiction, and thereby nullify the will of Congress."

The paramount and essential duty conspicuously enjoined upon the Commission is found in the mandatory language of Section 12:

> "The Commission is hereby authorized and required to execute and enforce the provisions of this Act."

It will be observed that this language is not permissive; nor does it merely give the Commission license or leave to execute and enforce the provisions of the Act, but the Commission is *authorized*; that is, given the right and power—and *required*; that is, compelled and constrained—

to *execute*; that is, to complete, to perform, to do, to carry out—and *enforce*; that is, to put in execution, to cause to take effect, the provisions of the Act.

And the Commission cannot by the terms of the Act execute and enforce some of the provisions and ignore others; the language is, "provisions of this Act"—not part, but *all* of them.

In *I. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 479, 501, this court, speaking by Mr. Justice Brewer, said:

> "The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

The relator conceives that, although the forms of law with respect to hearing and investigation were followed by the Commission, yet in dismissing the petition on jurisdictional grounds, the Commission has acted without legal excuse; each of the several acts and doings of the Commission in respect to the complaint were regular, but the crowning act, to wit, the dismissing of the petition, relator conceives to have been unauthorized. And any act in connection with a judicial or quasi-judicial proceeding for which there is no legal excuse is subject to the control of the courts by mandamus. In *West vs. Hitchcock*, 19 App. D. C., 333, the Court of Appeals of the District of Columbia, after stating the general rules of mandamus applicable to the courts of the District, concerning the issuance of that writ to the heads of departments or chiefs of bureau, upon whom some special duty has been devolved by law, said:

> "The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings

> of a judicial or quasi-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus, when the officer or person charged to perform it, arbitrarily and without just legal cause refuses such performance."

2. In addition to the special relief prayed for under the first subdivision of this head, the relator asks for general relief as a citizen of the United States in that the court grant a writ of mandamus ordering and commanding the Commission to enforce the provisions of the Act to regulate commerce in Alaska, particularly in requiring the carriers defendant in case No. 2518 "to print, file, publish and keep open to public inspection" their schedules of rates, fares and charges.

The language of the Act (Sec. 6) is:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

The function of the Commission in respect to enforcing the requirement as to the filing of schedules was stated by this Court in *I. C. C. vs. C. N. O. & T. P. Ry. Co.*, 167 U. S., 479, 507. After referring to many of the important duties of the Commission, the court said:

> "It (the Commission) must also see that publicity, which is required by Sec. 6, is observed by the railroad companies."

If the duty and obligation of the Commission in this behalf be executive in its nature, the provision above quoted, considered with the provisions of Section 12 of the Act, does not admit of the exercise by the Commission of any discretion. And if it shall fall within what has been vaguely termed "administrative duties," it is to be noted that the word "administrative" is but a synonym for "ministerial" (Bouvier; Words and Phrases Jud. Def.).

The Commission in undertaking to carry out its duty of enforcing the provisions of the Act in respect to filing and publication of tariffs, must first interpret the statute and then apply it.

Cooley, Cons. Lim. (6th Ed.), p. 109:

> "It is the province of judges to determine what is the law upon existing facts. In fine, the law is *applied* by the one, and made by the other (Legislature). To do the first, therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act."

Whether the act or acts performed by the Commission concerning the requirement of the publication of tariffs be administrative or quasi-judicial, it is clear that if administrative, there is no discretion vested in the Commission, and it is also clear that if judicial or quasi-judicial, and judicial discretion is pleaded, such plea cannot be sustained here because there has been an abuse of discretion. Abuse of judicial discretion ceases to be discretion at all and, as heretofore shown, is subject to the writ of mandamus.

In the view of the relator, the Act to regulate commerce enjoins upon the Commission the duty of enforcing the requirement as to the filing and publication of rates for the transportation of commodities between points in Alaska; to refuse, as the Commission has refused, to obey such

command of the statute, is clearly the exercise of an arbitrary power for which there is no just legal excuse.

The relief now sought by relator therefore is that the Commission be required to perform two duties:

(1) Judicial, by assuming jurisdiction of relator's complaint and deciding the same upon its merits, the Commission heretofore having erred as a matter of law in refusing to entertain jurisdiction and decide.

(2) A duty which is administrative or ministerial, by requiring certain carriers to comply with the Act by filing schedules of rates, fares and charges.

As to a judicial or quasi-judicial duty sought to be enforced, mandamus is the proper remedy—specifically, where the question of jurisdiction has been determined erroneously as a matter of law. And if discretion be necessary, when abused, mandamus lies.

As to an administrative duty, the provisions of the statute itself, fortified by the interpretation thereof by this court, admit of no discretion in the Commission.

In this proceeding no amplification of the purposes and objects of the writ of mandamus is sought or deemed necessary; reliance is had on the law as heretofore laid down by this court.

In *Virginia vs. Rives,* 100 U. S., 313, this court said:

> "In what cases such a writ (mandamus) is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the

> case is outside of the exercise of this discretion, and outside of the jurisdiction of the court or officer to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds."

We concede that mandamus may not issue to control *a proper* exercise of discretion vested in any public tribunal or official, and that the writ is only available to compel the performance of a purely ministerial duty upon the part of an executive or administrative department or board. However, it is not always clear whether a certain function is discretionary, or whether it is merely ministerial so as to admit of mandamus to compel its performance; and in every case in which this court has been asked to pass upon the propriety of this remedy, the entire argument has turned upon the question whether or not the certain duty, the performance of which was sought to be required, was discretionary in the officer or tribunal, and therefore *not* subject to mandamus, or whether it was merely ministerial and therefore obligatory.

Thus, in the earliest case on the subject (*Marbury vs. Madison*, 1 Cranch., 163), this was the question which the court had to determine in considering whether or not mandamus should issue. Marbury was appointed by President Adams and confirmed by the Senate, but his commission was not delivered. Prior to its delivery, President Jefferson came into office, and his Secretary of State, Mr. Madison, refused to deliver the commission, *contending that it was discretionary with the Executive Department to determine whether the appointment made by the preceding administration should be consummated.* The court held that the appointment had been made and completed; that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, involv-

ing no further exercise of official discretion on the part of the Secretary, and could be enforced by mandamus. The decision turned upon the nature of the act which the Secretary of State should perform and the argument was advanced there in favor of discretion in the Secretary, as it is advanced here in favor of discretion in the Commission. The act, the performance of which is sought to be enforced by mandamus, is as much ministerial in the pending case as was the act sought to be enforced in *Marbury vs. Madison.*

So in *Kendall vs. U. S.*, 12 Pet., 524, the same question arose. Kendall, upon coming into the office of Postmaster General of the United States, took occasion to re-examine certain contracts for the transportation of the mail entered into by the relators with his predecessor in office; and acting upon what he considered to be his proper discretion as an officer of the Executive Department, thereupon directed that "certain allowances and credits made under said contract" by his predecessor should be withdrawn. Upon the presentation of a memorial to Congress by the relators, a law was passed by virtue of which "the Solicitor of the Treasury was authorized and directed to settle and adjust the claims of the relators for extra service performed by them; to inquire into and determine the equity of such claims; and to make the relators such allowances therefor as upon full examination of all the evidence, may seem right according to the principles of equity. And that the Postmaster General be and he hereby is directed to credit the relators with whatever sum or sums of money, if any, the Solicitor shall so decide to be due to them for and on account of any such services or contract." Upon this authority the Solicitor "did make out and communicate his decision and award to the Postmaster General, by which award and decision, the relators were allowed $161,-

563.89." The Postmaster General partially complied with this award, but refused "to credit the relators with the residue of the sum so awarded by the Solicitor, amounting to $39,462.43." Thereupon, proceedings were had which resulted in the issuance of a peremptory writ of mandamus commanding the Postmaster General "forthwith to credit the relators with the full amount awarded and decided by the Solicitor of the Treasury to be due to the relators." The position of the Postmaster General was that the Solicitor's award was not a final adjudication, conclusive of the rights of the relators. On the contrary, he *construed* the act as necessarily leaving him with authority by reason of his office finally to pass upon the question. This court held that he was mistaken in his construction; that he had no discretion under the law, but was under a mandatory requirement to perform merely a ministerial duty and that non-performance subjected him to mandamus.

Does not the case at bar involve the identical question there decided? The Commission takes the position that it is vested with discretion to determine whether the Act to regulate commerce applies in Alaska, and that because its decision was discretionary, it is not subject to mandamus. But if the court shall determine that the Commission's construction of the law was erroneous, that it was the intention of Congress that the law should apply in Alaska without leaving the determination of that question to the discretion of the Commission, is not the Commission in such case to be considered as having been charged all the while with the ministerial duty of enforcing the law, or of permitting the law to extend itself by virtue of its properly interpreted provisions? *Does the Commission's error of law divest the court of the power to require by mandamus the enforcement of a statute according to the intent of Congress?*

As stated by Chief Justice Taney in his dissenting opinion in *Kendall vs. U. S.*, 12 Pet., 852, "mandamus was originally issued by the court of King's Bench to *enforce the execution of the law*." Can it be argued that the Commission has complied with its duty "to enforce the execution of this law" *by denying its power so to do?* If the Commission was mistaken in its view that it was without power to enforce the Act in Alaska, can it be said that such mistake was discretionary? If this court shall decide that the law does apply in Alaska, was it not and is it not mandatory upon the Commission to enforce it in compliance with what this court shall determine to have been the legislative will? If the Commission be subject to this mandate of Congress, may it erroneously construe the law and then be heard to say that the exercise of what is claimed to be a discretionary power by virtue of which such erroneous construction was made, defeats the only process (mandamus) by which any judicial tribunal can correct the error and thus provide for the carrying out of the legislative intent?

Rather is it not plain, if the law is mandatory that its provisions shall apply in Alaska, that the Commission has but a ministerial duty to perform in so enforcing it? As to the *precise manner* in which it shall be enforced, that is concededly *within the discretion of the Commission*, which when exercised in certain cases and not abused, cannot be reviewed or modified by any judicial process. But this would bring forward a very different case from the one at bar, *in which the Commission refused to consider the merits of the complaint so as to call for the exercise of any discretion really committed to it.* If the Commission had come to that point and had then decided, for example, that in its judgment no through route was warranted upon the facts, relator would have had no standing in its application

for mandamus—in other words, we could not ask the court by mandamus to direct the Commission *how* to proceed, but only that it *must* proceed, according to its own judgment, to a final determination of this cause arising under the Act to regulate commerce. The ministerial act which is sought to be enforced consists in assuming that jurisdiction of which the law *requires* the exercise by the Commission.

It is absurd to say that a construction of all provisions of the Act is left as a matter of discretion to the Commission. That body is vested with discretionary powers only in the instances which are invariably pointed out with particularity in the Act itself. Suppose the Commission should so construe the law as to hold that express companies, which are specified in the Act as coming within its purview, shall be exempt; or suppose they should hold that the law applied in Arizona and not in New Mexico. Would the only remedy in such case be an appeal to Congress or the President that the personnel of the Commission be changed so as to bring about a "construction" which would make possible the enforcement of the law in accordance with the will of Congress? As pointed out by this Court in *Kendall vs. U. S.*, 12 Pet., 615, this might not afford any certain relief, for their successors might be impelled to act in the same arbitrary manner; "and besides such extraordinary measures are not the remedies spoken of in the law which will supersede the right of resorting to a mandamus."

Can it be successfully maintained that such arbitrary action would be merely a "political act" which Chief Justice Marshall in *Marbury vs. Madison* said would preclude the possibility of mandamus? Would it not be rather such an abuse of an "executive function" as would make imperative the granting of the writ to redress a public wrong?

In the case now presented the Commission undertook to determine a question (as to the status of Alaska), which

had not been committed to its determination, but had already been determined by Congress and by the decisions of this Court. Upon this erroneous and unwarranted conclusion the Commission based its refusal to pass upon *the merits of the case* as presented, and this is the ministerial duty sought to be enforced, *i. e.*, to hear and determine this case *upon the merits.* Relator did not ask the Commission to determine whether or not Alaska is a Territory, but to determine whether or not, upon the facts presented, a through route should be established between the Humboldt Steamship Company and the White Pass & Yukon Railway Company. The Commission was asked to pass upon the merits of this latter issue and in so doing that tribunal necessarily would have had to exercise discretion. Had it reached the point of so doing concededly mandamus would not have been available to guide or control the discretion so exercised.

The right of the relator to the writ of mandamus cannot be made to depend upon the opinion, judgment, discretion, caprice, or whim of the Commission—a creature of the Legislature and bound to perform the duties with which it is charged. If the Commission had unanimously decided that in its judgment Alaska *was* a Territory, that determination could not make the fact any more or any the less certain, because the decision of that question is not for the Commission. If the Commission should unanimously decide that Pennsylvania and New York are not "States" in the true signification of that appellation, and that, therefore, commerce passing between those two States was not the subject-matter of regulation under the Commerce Act, can there be any doubt that mandamus would lie to compel the hearing and determination of a cause so arising? And is the status of New York and Pennsylvania as States any

more or less a question, the final decision of which is committed to the Commission, than is the status of Alaska as a Territory?

If every Department of the Government which is charged with the administration of a particular law may determine such questions in its own peculiar way and then claim that such determination is within its discretion and therefore not controllable by mandamus, or any other process, we will have the anomalous situation presented of the Interstate Commerce Commission refusing to apply the Act to regulate commerce in Alaska because Alaska is *not* a Territory; the General Land Office applying to Alaska the laws which it administers because Alaska *is* a Territory; and each of the Executive Departments adopting its own peculiar view in this regard. As is pointed out at page 23, *supra*, every Department of the Government, with the exception of the Interstate Commerce Commission, has held Alaska to be a Territory, so that the anomaly which we have pictured is not imaginary.

Concededly the existence of an adequate remedy by appeal, writ of error, or other process by which a decision of any inferior tribunal might be reviewed precludes relator from recourse to mandamus for that purpose, for if such other remedy exists he must first exhaust it, mandamus not being available to afford relief for which these other remedies may be available, or to anticipate the relief which those remedies would afford if the cause had reached the point where he would have a right of appeal. This we think is the meaning of *Commissioner of Patents vs. Whiteley*, 4 Wall., 534, upon which counsel for the Commission so much relies to the following effect:

> "It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to de-

> cide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal. * * * It cannot be made to perform the functions of a writ of error."

This is merely another statement of the familiar rule that,

> "A writ of mandamus cannot issue to review a final judgment subject to review here on a writ of error. Mandamus cannot be used to perform the office of a writ of error." *Re Baltimore & O. R. Co.,* 108 U. S., 566.

Or, stated differently:

> "The court cannot issue a writ of mandamus in a case where the proper remedy is by appeal, merely because the appropriate remedy may involve an inconvenient delay."
> *Re Conn. Mut. L. Ins. Co.,* 131 U. S., clxx. Appx. See also *Re Hoyt,* 13 Pet., 279; *Re Atlantic Cy. R. Co.,* 164 U. S., 633.

We earnestly ask the court to note the inapplicability of the principle so announced in the above cases to the material issue in the instant case, where the Commission "refuses to decide" the cause presented to it *upon the merits* under a misapprehension as to a material fact (the status of Alaska) *which has been established by Congress and ascertained by several authoritative decisions of this Court.* The fundamental distinction between this case and *Commissioner vs. Whiteley, supra,* is that from the decision of the Commissioner of Patents in the *Whiteley* case, "whether right or wrong, the relator had a right, under the statute, to appeal."

When the real issue in this case is understood we may with all confidence rest upon the principle announced by this Court in the *Whiteley* case, *supra,* to wit:

> "It (mandamus) lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion."

In the same connection, we call particular attention to the controlling application of the doctrine stated by this Court in *Ex parte Parker,* 120 U. S., 737.

In *Craig vs. Leitensdorfer,* 123 U. S., 189, Mr. Justice Matthews, speaking for a unanimous Court, said:

> "If the duty of the Commissioner of the General Land Office to entertain and determine that appeal exists as contended, it is a legal duty. That duty is to take up, consider, and adjudge the rights of the parties in interest, and *the entertaining of the appeal is a purely ministerial act, although the questions to be considered in the course of that appeal are to be resolved by the exercise of official discretion and judgment. Nevertheless, it is quite clear, as it has been oftentimes decided, that the duty of entering upon their consideration and proceeding to their determination, is strictly ministerial.* The remedy in such cases is at law, by means of a writ of mandamus, and not in equity. *Ex parte* Parker, 120 U. S., 737; *Ex parte* Brown, 116 U. S., 401. (Italics ours.)
>
> "If, to such a writ, issued by a competent court, the officer should make return that he was precluded from entertaining the appeal by reason of the prior action of a predecessor in office, under the order of the President, the question of the sufficiency of that return would be presented to the court issuing the writ, and would involve necessarily the adjudication of the questions mooted in this case. * * * If, on the other hand, such a return in such a proceeding should be

adjudged to be insufficient, then the complainant would have the remedy which he is here seeking, by a direct and effective process binding upon the parties whose conduct he is seeking to control."

It will be noted this statement exactly covers the question here presented: the Commission "makes return that it is precluded from entertaining the case"; the lower courts adjudged such return to be insufficient because the Commission committed error in holding that Alaska is not a Territory and that its jurisdiction did not attach under the Act to regulate commerce. Under the decision of the lower courts, relator's right to have his case entertained by the Commission and determined *upon the merits* was guaranteed to him under the Act, and as observed by Mr. Justice Field, delivering the opinion of this Court in *Hollon Parker*, 131 U. S., 221, *"Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise.'* (Italics ours.)

The duties of the Commission are of such varied character it is essential that the members thereof should be of wide and varied experience—some lawyers and some with expert knowledge on other subjects. It is infrequent that technical rules of law are applied or that technical points of law are raised in cases coming before them. It has never been held that the members of the Commission are to be considered "judges" in the technical sense. Hence, their construction of the law should not necessarily have binding and conclusive force as a judicial determination of a technical legal question which according to the whole intent and purpose of the Constitution and of our system of government, is peculiarly within the province of the judiciary. According to the view of the learned Justice sitting in the Supreme Court of the District of Columbia, relator's right

before the Commission depended entirely upon a "construction of the law"; and, it may be added, such construction of the law involved the determination of a *judicial question* coming peculiarly within the province of a *judicial tribunal*. The Commission is not an arm of the "judicial system." It is neither a Federal Court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings." *K. & I. B. Co. vs. L. & W. R. Co.*, 37 Fed., 567. Hence, when the Commission has erred in a matter of statutory construction, it is for the courts to correct the error. Can it be said that the right of the appellant to have a correct construction of the law by the judiciary is defeated and forever lost merely because the Commission was unable to arrive at a clear understanding of its duty, and by a vote of four to three adopted an erroneous view thereof? The duty of the Commission was either "clear" or there was no duty at all—four members of the Commission failed to see the duty while three members—and subsequently the courts below—did see it clearly. Can it be said that the law is so ambiguous that it can never be clearly defined by *any* Court merely because it appeared nebulous and not susceptible of clear definition by the first body of men which happened to consider it?

Questions of jurisdiction come peculiarly within the province of courts, skilled in the interpretation of laws, and not of commissions organized for definite ends by the legislature—to carry out and enforce one special law—and with no duties other than those prescribed in the organic act. How can it be said that the conclusion of such a commission (composed in part of laymen) upon a legal proposition involving a question as to its own jurisdiction, forever precludes the judiciary from even considering it?

Theoretically, the meaning of a statute is always clear. The decision of the court interpreting the statute states that meaning and the fact that the decision is by a divided court does no make it any the less clear; the *meaning* is that given it by a majority of the court which has power finally to determine the question. And in this case it is for the courts to define the meaning of the statute, and so to render the duty of the Commission clear.

The essential basis upon which the learned Justice sitting in the Supreme Court of the District of Columbia rested his decision refusing to issue the mandamus in this case is perhaps best summarized in the following language of the opinion:

> "The writ of mandamus is an extraordinary writ that is to be issued only where the party applying for the same has a clear legal right to the relief he claims, which he cannot obtain by any other proceeding. He must not only have a clear legal right, but there must be a clear legal duty on the part of the respondent, which he refuses to perform, and that duty must be ministerial in its character, and in no degree discretionary."

This statement of the law is subject to no contradiction; but it is obvious that in every case a determination of the question as to when there exists "a clear legal right" must be met as a condition precedent to the determination of the question as to whether or not the writ should issue in any case. Who is to determine when the legal right is "clear," or who is to render clear that which may otherwise remain doubtful so as to pave the way for the enforcement of a "legal right" which otherwise might never become available at all? Can it be said that the law in a given case is any the less binding when that case shall finally have been

determined by this court simply because the lower courts may have differed in their views concerning it, and then finally that this Court may have divided upon the question by a vote of five to four? Does not a decision by five members of this Court render the law just as certain and the legal duty resting upon the party just as "clear" as though all the lower courts and the undivided Supreme Court had entertained no doubt but had adopted a unanimous view on the question?

Nor can the opinion of the learned Justice of the Supreme Court, D. C., to the effect that a duty sought to be enforced by the writ of mandamus "must be ministerial in its character, and in no degree discretionary," be controverted; but we respectfully submit that the Court also erred in its application of this principle to the instant case. In order to regard the principle so expressed as being pertinent to its decision in this case the Court necessarily considered the duty of the Commission, for the enforcement of which a writ of mandamus was asked, not "ministerial" but "discretionary." We think that view essentially a mistaken one, and that upon the adoption by the Court of the view that the Act to regulate commerce applies in Alaska, the duty of the Commission thereupon immediately became "ministerial"; is to be considered as having been such *ab initio,* and never to have been in any degree "discretionary."

In *Decatur vs. Paulding,* 14 Pet., 497, the Court, speaking by Chief Justice Taney, said:

> "The first question, therefore, to be considered in this case, is, whether the duty imposed upon the Secretary of the Navy, by the resolution in favor of Mrs. Decatur was a mere ministerial act. The duty required by the resolution was to be performed by him as the head of one of the executive departments of the Government in the ordinary discharge of his offi-

> cial duty. In general, such duties, whether imposed by an Act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is, from time to time, required to act."

While the head of an executive department "is continually required to exercise judgment and discretion" in the performance of his duties, a construction of the law is essential to determining *whether or not there is any duty*, and thus to reach the point of determining the extent of his discretion in the performance of such duty, or in the exercise of *any* authority.

To quote again from the opinion in the *Decatur* case, *supra:*

> "If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decisions to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the case before them. The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion and judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matter committed to his care, in the ordinary discharge of his official duties."

As hereinbefore pointed out, the application of the Commerce Act to carriers in Alaska is not a duty *resting within the judgment* of the Commission; the extent of the application of that Act, territorially, is not a matter committed to the discretion of the Commission. Congress itself by legislative enactment undertook to settle that question and if its intention can be determined by the judiciary from a reading of that enactment, Congress must be considered to have already exercised the discretion which, it is contended, was properly exercisable by the Commission. In other words, *if the courts shall determine from a reading of the Act that Congress, in the sound exercise of its "judgment," intended to include Alaska, there is no longer any occasion or opportunity for the exercise of any "judgment" on the same point by the Commission.* The main duty, then, resting upon the Commission would be to carry into effect the provisions of the Act in Alaska and this main duty, having been imposed by Congress without leaving its performance or non-performance to the discretion of the Commission, is a "ministerial" duty enforcible by the writ of mandamus. Of course, those subordinate duties which come into being *as affecting Alaska* after the main duty of the Commission to carry into effect the entire Act in that Territory shall have been determined, may involve the exercise of discretion *which this Court has held it would be beyond the power of any other tribunal, by any process, to control.*

As observed by this Court in Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S., 452: "Power to make the order and not the mere expediency or wisdom of having made it is the question."

We did not ask the Court below to pass upon any matter involving a question of "expediency or wisdom" committed solely to the Commission; on the contrary, a dismissal of

the complaint by the Commission upon the ground that there was a want of jurisdiction, when the law as correctly interpreted does in fact vest such jurisdiction, is beyond the Commission's "power to make," and, therefore, correctible by the judiciary. The order of dismissal entered by the Commission, predicated upon a want of jurisdiction in Alaska, worked a repeal *pro tanto* of the Commerce Act as correctly interpreted by the courts below, hence was not "within the scope of the delegated authority under which it purports to have been made."

The Interstate Commerce Commission, unlike the Commissioner of the General Land Office, is not subject to correction by any process known to the courts *when it has disposed of a case by the exercise of the discretionary powers which are entrusted to it.* But can the Commission at will contract or broaden the scope of the discretionary powers which are expressly vested in it by the Commerce Act so as to include the power *to extend the legislation of Congress to one part of the country and to exclude a certain other part from its application?* Congress has undertaken to designate the *places where* the law shall be enforced and has left only the manner of its enforcement to the discretion of the Commission.

As said by this Court in *Field vs. Clark,* 143 U. S., 649, 692:

> "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objections can be made."

Congress Has Not Attempted to Delegate Authority to the Commission "To Make the Law" for Alaska.

In *United States ex rel. Redfield vs. Windom*, 137 U. S., 636, after citing the cases defining the principle upon which persons holding public office may be compelled by writ of *mandamus* to perform duties imposed by law, the Court proceeds:

> "That principle is that the writ of *mandamus* may issue, where the duty, which the Court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion."

The principle so announced does not conflict with the principle upon which we rely. The duty of the Commission is "plainly ministerial"—indeed, the duty of the Commission, to allow the Act to regulate commerce (as correctly interpreted by the Court below) to extend itself over common carriers in Alaska, is so nominal as to be, if we may use the expression, almost *less than ministerial*. The law, when properly interpreted, applies *ex proprio vigore*. But after the law has been permitted to extend itself, the Commission is then asked to execute its provisions, *e. g.*, to proceed to a determination of the case submitted to it *on the merits*, to receive in its office the tariffs which the law requires carriers in Alaska to file, and upon their failure so to file tariffs to call the matter to the attention of the Attorney-General for prosecution. Hence, we insist that the duty of the Commission, the performance of which the lower court was asked to require by mandamus, is "plainly

ministerial," and the courts by their construction of the Act, have made that duty "clear." When the intendment of Congress is so defined and made clear by the judiciary, the discharge by the Commission of its duties under the law can no longer be said to involve "the exercise of judgment or discretion." And if the enforcement of this duty cannot be accomplished by the writ of mandamus, appellant is assuredly "without any other adequate remedy."

In *United States ex rel. Boynton vs. Blaine,* 139 U. S., 306, Mr. Chief Justice Fuller, speaking for a unanimous Court, sets forth the following principles governing the issuance of the writ of *mandamus,* all of which have been discussed, *supra,* with particular reference to their application to the instant case:

> "The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. United States *ex rel.* Redfield vs. Windom, 137 U. S., 636, 644. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the Government; that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them. United States *ex rel.* Dunlap vs. Black, 128 U. S., 40, 48. The writ goes to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act. Brownsville vs. Loague, 129 U. S., 493, 501."

This Court in that case did not require the issuance of the writ of *mandamus* because the facts did not warrant such action—the party to be coerced did not "have the power to perform the act," and it was not his duty to do that which the writ was asked to compel him to do.

But here, if the Act to regulate commerce, upon a proper interpretation thereof, applies in Alaska, it was the duty of the Commission to execute and enforce that Act without being required so to do by a *mandamus*. This application for the writ of mandamus was not made for the purpose of conferring "new authority" upon the Commission, but to compel it "to do that which it is the Commission's duty to do without it." The Commission already had "the power to perform the act," and the authority, which the courts below held it to possess, was conferred, not by the courts' decisions, but by the Act to regulate commerce passed prior thereto.

CONCLUSION.

In conclusion it is respectfully submitted that the Court of Appeals of the District of Columbia was correct in holding that the Act to regulate commerce applies in Alaska, and that the Supreme Court of the District of Columbia has the power in this case to issue the writ of mandamus requiring the Interstate Commerce Commission to execute and enforce the provisions of that Act in said territory; the decision of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 859. Argued April 16, 1912.—Decided April 29, 1912.

Alaska is a Territory of the United States within the meaning of § 1 of the Interstate Commerce Act, as amended June 29, 1906, 34 Stat. 584, c. 3591.

An organized Territory of the United States does not necessarily mean one having a local legislature as distinguished from one having a less autonomous form of government, such as that of Alaska.

Even if "Territory of the United States" as used in § 1 of the Inter-State Commerce Act as amended includes only organized Territories, Alaska falls within its meaning. *The Steamer Coquitlam*, 163 U. S. 346; *Binns* v. *United States*, 194 U. S. 486; *Rassmussen* v. *United States*, 197 U. S. 516.

The Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, extended the provisions of the Interstate Commerce Act to interterritorial commerce and for the first time gave to the Commission the power to fix rates. In so doing it made the act completely comprehensive, and the power given to the Commission superseded the power of the Secretary of the Interior to revise and modify rates of railroads in Alaska given by § 2 of the act of May 14, 1898, 30 Stat. 409, c. 299.

Mandamus can be issued to direct performance of a ministerial act but not to control discretion. It may be directed to a tribunal, one acting in a judicial capacity, to proceed in a manner according to his or its discretion.

The jurisdiction to determine jurisdiction, *Ex parte Harding*, 219 U. S. 363, does not exist in an administrative body which is subject to having its jurisdicton defined by the courts.

The United States Commerce Court has no jurisdiction to review the action of the Interstate Commerce Commission in refusing to entertain a complaint because the subject is beyond its jurisdiction. In such a case the remedy is by mandamus to compel the Commission

to proceed and decide the case according to its judgment and discretion.

The Interstate Commerce Commission has jurisdiction to investigate violations of the Act to Regulate Commerce in Alaska, and to compel carriers in that Territory to conform to the law; and if the Commission refuses to act on the ground that it has no jurisdiction, mandamus will issue directing it to take jurisdiction.

39 Washington Law Reporter, 386, affirmed, and 19 I. C. C. 81, disapproved.

THE facts, which involve the status of common carriers in Alaska under the Interstate Commerce Act, and the jurisdiction of the Interstate Commerce Commission over common carriers in Alaska, are stated in the opinion.

Mr. P. J. Farrell for plaintiff in error:

Alaska is not a Territory of the United States within the meaning of § 1 of the Act to Regulate Commerce. *Matter of Water Carriers in Alaska*, 19 I. C. C. 81.

In the jurisdictional clause of the Hepburn Act, the District of Alaska is not included by name and the word "District" as used in that section is confined to the District of Columbia.

Alaska has never been officially designated as a Territory: see act of May 17, 1884; Rev. Stat. 1 Sup., c. 53, p. 430; act of June 4, 1887, providing for the appointment of commissioners of deeds and a marshal; act of July 24, 1897, providing for the appointment of a surveyor general; act of June 6, 1900, 31 Stat. 321, making further provision for a civil government for Alaska.

In the Appropriation Acts of 1907 and 1908, 34 Stat. 963, and 35 Stat. 212, Alaska is called a District, while Arizona, New Mexico, and Hawaii are described as Territories. See also acts of January 27, 1905, 33 Stat. 616; of March 3, 1905, 33 Stat. 1262 and 1265; § 1, act of February 4, 1887; act of June 18, 1910.

At the time the amendment of June 29, 1906, was passed Congress was acquainted with the rulings of the

Commission that the District of Alaska is not a Territory of the United States within the meaning of § 1 of the Act to Regulate Commerce. See the Townsend Bill (H. R. 17536), reported to the Whole House by the Committee on Interstate and Foreign Commerce in the second session of the Sixty-first Congress on April 1, 1910; and the Fletcher Bill (S. 9975), introduced January 9, 1911.

Both attempts to place common carriers operating lines of transportation in Alaska under the control of the Commission failed.

Under these circumstances, this court will consider itself bound by the interpretation of the Commission, which is the tribunal primarily charged with the enforcement of the provisions of said act. See *New Haven R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, holding that an interpretation placed on the act by the Commission in the cases of *Haddock* v. *Delaware, L. & W. R. Co.*, 4 I. C. C. Rep. 296, and *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. Rep. 535, was binding upon the court.

The authority conferred upon the Secretary of the Interior by the act of May 14, 1898, has not been taken away by § 10 of the Hepburn Law. The law does not favor repeals by implication, Alaska is not referred to by name either in the Hepburn Law or in the act to regulate commerce, and Congress has never specifically conferred upon the Commission jurisdiction over any common carrier in any district of the United States except the District of Columbia.

Mandamus is not a proper proceeding in which to correct an error of law like that alleged in the petition. *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522; *West* v. *Hitchcock*, 19 App. D. C. 333, 342; *Decatur* v. *Paulding*, 14 Pet. 497, 514; *United States* v. *Black*, 128 U. S. 40, 48; *United States* v. *Guthrie*, 17 How. 284; *Georgia* v. *Stanton*, 6 Wall. 50; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Windom*, 137 U. S. 636, 644; *United States* v. *Blaine*,

139 U. S. 306, 319; *United States* v. *Lamont*, 155 U. S. 303, 308; *Kimberlin* v. *Commission to Five Civilized Tribes et al.*, 104 Fed. Rep. 653.

The preliminary question of jurisdiction the Commission decided was as much within the scope of its authority as any other which could arise. Having resolved it in the negative, there was no occasion for the Commission to look further into the case. Only a reversal by the tribunal of appeal can revive it, and cast upon the Commission the duty of further action in the premises.

This proceeding in mandamus is not the only remedy open to defendant in error. See *Proctor & Gamble Co.* v. *United States*, 188 Fed. Rep. 221.

Mr. Charles D. Drayton, with whom *Mr. John B. Daish* and *Mr. James Wickersham* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The ultimate question in the case is whether Alaska is a Territory of the United States within the meaning of the Interstate Commerce Act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, 19 I. C. C. Rep. 81.

The steamship company instituted an action in the Supreme Court of the District of Columbia praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned,

hereinafter specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory, and over those carriers operating between the State of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The Court of Appeals, to which court the case was taken by the steamship company, entertained the same view of the Interstate Commerce Act as that expressed by the Supreme Court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the Supreme Court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to take jurisdiction of said cause and proceed therein as by law required." To this ruling the Interstate Commerce Commission prosecutes this writ of error.

The proceedings before the Commission were instituted by the steamship company filing a petition (No. 2578) against the White Pass & Yukon Route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, to require said companies to file with the Commission, in the form prescribed by the Act to Regulate Commerce, and to print and keep open for public inspection, schedules showing their rates and charges for transportation of passengers and property between points in Alaska and

points in the Dominion of Canada and other places; to establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the State of Washington; to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines; and to cease and desist from preventing by sundry devices the carriage of freights from being continuous from place of shipment to place of destination when such freight is originated or in any wise handled by the Humboldt Steamship Company.

The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was "without jurisdiction to make the order sought by complainant," resting its ruling upon the authority of its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska, supra.*

Section 1 of the Interstate Commerce Act provides that the provisions of the act "shall apply to any . . . common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, . . . or from any place in the United States through a foreign country to any other place in the United States. . . ." 34 Stat. 584.

The pivotal words are: "From one State or Territory of the United States . . . to any other State or

Territory, . . . or from one place in a Territory to another place in the same Territory," "Territory" being the especially significant word.

If we may venture to reduce to a single proposition an elaborate discussion of elements and considerations, we may say that the Commission gave to the word "territory" the signification of "organized territory," the chief and determining feature of which is a local legislature as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed.

To this signification and distinction the arguments of counsel are addressed, and much of the reasoning of the lower courts. That field, however, has been traversed by cases in this court, and it need not again be passed over. We may accept and apply the conclusions which have been reached and expressed.

In the case of *Steamer Coquitlam* v. *United States*, 163 U. S. 346, the relation of the courts of Alaska to the Federal judicial system and the applicability of certain statutes concerning the same were decided, after a review of those statutes and those defining the status of Alaska.

By the fifteenth section of the act of March 3, 1891, creating the Circuit Court of Appeals, it is provided that the Circuit Court of Appeals, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act, shall have "the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits." 26 Stat. 826, 830, c. 517.

In execution of the duty imposed by that section, this

court, by an order promulgated May 11, 1891, assigned Alaska to the Ninth Judicial Circuit.

Subsequent to this order the United States brought a suit in admiralty in the District Court of Alaska for the forfeiture of the steamer Coquitlam because of an alleged violation of the revenue laws. A decree was rendered for the United States and an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. The United States disputed the jurisdiction of the court on the grounds: (1) that the District Court of Alaska was not a district court within the meaning of the sixth section of the Circuit Court of Appeals Act; and (2) that the District Court of Alaska was not a Supreme Court of a Territory within the meaning of that act and the order of this court assigning Alaska to the Ninth Circuit.

The court certified the questions to this court. We answered the first in the negative and the second in the affirmative. We said, through Mr. Justice Harlan, that the Circuit Court of Appeals Act was necessarily interpreted by this court as conferring appellate jurisdiction upon the Circuit Court of Appeals when by the "order of May 11, 1891, 139 U. S. 707, Alaska was assigned to the Ninth Circuit." And it was further said (p. 352): "Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 (providing for a civil government for Alaska) is the court of last resort within the limits of that Territory. . . . No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska, in which the court of last resort is designated as the District Court of Alaska. The title of the territorial court is not so material as its character."

The case needs no comment. It clearly defines the

relation of Alaska to the rest of the United States. It was not a description of a definite area of land or "landed possession," but of a political unit, governing and being governed as such.

This view is reinforced by other cases. In *Binns* v. *United States*, 194 U. S. 486, 490, 491, we said, through Mr. Justice Brewer, that we had held in *Steamer Coquitlam* v. *United States* that "Alaska is one of the Territories of the United States." And also: "Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, 23 Stat. 24, entitled 'An act providing a civil government for Alaska,' provided: That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided."

In *Binns* v. *United States* the fact of a local legislature, or indeed any special form of government, was not considered as necessarily a feature of an organized Territory. "It must be remembered," it was said, "that Congress in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories." There is much more in that case which might be quoted as establishing that the status of Alaska is that of an organized Territory. See also *Rassmussen* v. *United States*, 197 U. S. 516.

It is contended further by the Commission that railways were first authorized to be constructed in Alaska by the act passed May 14, 1898, 30 Stat. 409, c. 299, and that § 2 of the act provided as follows:

"That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be

printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior."

The argument is that this provision brings into force § 6 of the Interstate Commerce Act, and that, it is said, "under familiar rules of construction, excludes the application of every other section in the act," and that, besides, the provision that the rates on the Alaskan railroads should be subject to revision and modification by the Secretary of the Interior "negatived the jurisdiction of the Interstate Commerce Commission, even if Alaska was apprehended to be within section 1 of the Interstate Commerce Act."

These contentions do not seem to have been made in either the Supreme Court of the District or in the Court of Appeals. It was referred to very briefly as a circumstance to be considered in a majority report of the Interstate Commerce Commission in the ruling case, and more at length in the minority report. In the latter report important circumstances were pointed out. The Interstate Commerce law preceded that which gave authority to the Secretary of the Interior to revise and modify railroad rates, and the authority was confined to that special exercise, and, so far, it may be said to have amended the Interstate Commerce Act. At that time it had been held in the *Maximum Rate Cases* (162 U. S. 184; 167 U. S. 479, and 168 U. S. 144), that Congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum or absolute. The power to prescribe a rate was conferred by the amendment of June 29, 1906, and that amendment extended the provisions of the act for the first time to intraterritorial commerce. The amendment made the act completely comprehensive of the whole subject and

entirely superseded the minor authority which had been conferred upon the Secretary of the Interior. As said by the minority of the Commission: "There is no suggestion of doubt that the ends of justice require as much the application of the same principle and regulation in Alaska as in New Mexico or Arizona." The two latter at the time this was said were Territories.

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed? The answer of the Commission is, by "a reversal by the tribunal of appeal." And such a tribunal, it is intimated, is the United States Commerce Court.

But the proposition is plainly without merit, even al-

though it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an applicant was not entitled to relief. This is so because the action of the Commission refusing to entertain a petition on the ground that its subject-matter was not within the scope of the powers conferred upon it, would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand.

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in *In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, 19 I. C. C. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

Judgment affirmed.